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1071

No. 2866

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**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

1071

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Transcript of Record.**

Upon Appeal from the United States District Court for the  
Eastern District of Washington, Southern Division.

**Filed**

FEB 5 - 1917

**F. D. Monckton,**  
Clerk.







**United States**  
**Circuit Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

FRANCIS A. GARRECHT, United States District  
Attorney, Federal Building, Spokane, Washing-  
ton,

Attorney for Plaintiff and Appellee,

and

H. J. SNIVELY, North Yakima, Washington,  
Attorney for Defendant and Appellant.

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*In the District Court of the United States for the  
Eastern District of Washington, Southern Divi-  
sion.*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEST SIDE IRRIGATION COMPANY, a Cor-  
poration,

Defendant.

**Amended Bill of Complaint.**

To the Honorable Judge of the District Court of the  
United States for the Eastern District of Wash-  
ington, Sitting in Equity :

Comes now the United States of America by Oscar  
Cain, United States Attorney, and E. W. Burr,  
Special Assistant to the United States Attorney for  
the Eastern District of Washington, and brings this  
its amended bill of Complaint against the West Side  
Irrigation Company, a corporation, and thereupon  
plaintiff says :



## I.

That this action is prosecuted at the request of the Secretary of the Interior and under the direction of the Attorney General of the United States.

## II.

That during all the times herein mentioned the defendant was and still is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at the city of Ellensburg therein; that the said corporation was organized for the purpose herein set forth and by law is authorized to construct and operate works and distribution systems for the purpose of furnishing water for irrigation and other purposes to individual water users upon the line of its irrigation systems and adjacent thereto: that in pursuance of the purposes for which the defendant corporation was organized and in accordance with the powers thereby acquired, it has purchased, enlarged, constructed, and now operated a canal with distributing works and is the possessor of an extensive water right.

## III.

That the plaintiff has availed itself of the provisions of an Act of the Legislature of the State of Washington entitled "An Act relative to the appropriation of waters of the State for irrigation purposes, granting the United States the right of exercising the power of eminent domain in acquiring lands, water and other property for rights of way, and for reservoir and other irrigation works, granting to the United States certain rights in state lands and waters of the State relating to water users associa-

tions, and declaring an emergency'' approved Mar. 4, 1905 (L. '05, p. 180), and as authorized thereby and in compliance therewith did, on the 10th day of May, 1905, file in the office of the Commissioner of Public Lands of the State of Washington a notice of the withdrawal of the then unappropriated waters of the Yakima River and its tributaries, which withdrawal has been maintained to the present time.

#### IV.

That a prerequisite to the construction of the Yakima project, certain conditions were imposed by the Secretary of the Interior, compliance with which was required for the adequate protection of the United States in its proposed work. Among said conditions was the settlement of the water rights of existing canal companies and water users lest the plaintiff be embroiled in litigation, and to the end that plaintiff might definitely ascertain the amounts of water which were subject to plaintiff's use and appropriation.

In pursuance to the conditions so imposed the defendant company did, on the 21st day of October, 1905, enter into a certain agreement, a copy of which instrument was annexed to the complaint herein, marked exhibit "A," by the terms of which agreement defendant company limited its right of appropriation from said Yakima River and its tributaries to eighty cubic feet of water per second of time from April to September inclusive, of each irrigation season thereafter and to 34 cubic feet of water per second of time in October of each year.

## V.

That said agreement was conditioned upon the announcement by the Secretary of the Interior of his determination to construct storage and irrigation works under the Act of Congress approved June 17, 1902 (32 Stat. 388), entitled "An Act appropriating receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," such announcement to be made within two years thereafter. That said agreement was to become null and void in the event of his failure so to do. That in pursuance thereof and of said Act of Congress, the acting Secretary of the Interior did, on March 27, 1906, announce his determination to construct storage and irrigation works for the utilization of the waters of the Yakima River and its tributaries.

## VI.

That the plaintiff consummated a purchase from the Washington Irrigation Company, a corporation, of that certain irrigation system known as the Sunny-side Canal together with the water rights of that corporation by deed dated June 23, 1906, and recorded in Vol. 47 of Deeds, page 586, records of Yakima County, Washington. That the said water rights so purchased amounted to a flow of water during the irrigation season equivalent to 1054 feet per second of time pursuant to appropriation made on February 22, 1890, and perfected by the exercise of due diligence in the beneficial use of said appropriated water supply.



## VII.

That in pursuance of the aforesaid Act of Congress and acts amendatory thereof and supplementary thereto, and relying upon the said agreement of defendant, the plaintiff, through the United States reclamation service, has examined, surveyed, located and constructed at a cost of \$7,200, and has now in active operation, extensive irrigation works for the storage, diversion and distribution of waters for the reclamation of arid and semi-arid lands in Kittitas, Yakima and Benton counties and plaintiff has authorized the construction of the works for the storage, diversion and distribution of waters for the reclamation of arid and semi-arid lands in Kittitas, Yakima and Benton counties and plaintiff has authorized the construction of the works necessary for the full utilization of the waters withdrawn as aforesaid and is diligently constructing the same, all of which irrigation works will, when completed, comprise the Yakima project.

## VIII.

That notwithstanding the conditions of said contract (exhibit "A") the defendant corporation has heretofore appropriated, diverted and used large quantities of water in excess of the amount to which it is entitled and thereby entailed great damage upon the plaintiff.

## IX.

That the defendant threatens to and will unless restrained by this Court to divert, consume and use large quantities of water in excess of the amounts to

which it is entitled under said contract; that if such diversion shall continue, as plaintiff believes it will, great and irreparable damage will ensue unto the plaintiff in this:

That the Yakima River above the north line of township 12, north, range 19 east, during the low-water portion of the irrigation season of each year, which in normal years continues from and after about July 1, is fully in use for irrigation purposes and the said flow is, and since the aforesaid purchase from the Washington Irrigation Co., has been, insufficient to permit the diversion by plaintiff of the water to which it is entitled by virtue of the said purchase. That both plaintiff and defendant divert their respective supplies of water above the last described point. That the amount of water in the Yakima River above the said described point consists of natural flow supplemented during the said low-water season by water released by the plaintiff from its reservoirs constructed as aforesaid. That said excessive diversion by defendant during the low-water season directly contributes to the shortage in the natural flow available to plaintiff, and furthermore unlawfully diminishes the amount of stored water which plaintiff, in pursuance of section 2 of the said Act of the State Legislature is engaged, during each low-water season, in transmitting to persons and corporations with whom plaintiff has contracted for the delivery of stored water.

#### X.

That plaintiff can make, and under the aforesaid

withdrawal and authorization is engaged in making beneficial use of the normal waters of the natural flow existing in the river prior to the low-water season of each year, both by storage and by the delivery thereof to persons and corporations contracting and to contract with plaintiff. That plaintiff has contracted with purchasers for the delivery of stored and natural flow waters, and in particular with that certain public corporation known as the Kittitas Reclamation District by articles of agreement made and entered into the 18th day of January, 1913, whereby plaintiff has agreed to deliver from the natural flow of the Yakima River and from its storage reservoirs a sufficient water supply for the irrigation of 82,000 acres of land, more or less, in Kittitas County, Washington. That the price to be paid by said Kittitas Reclamation District and other purchasers was rendered less on account of plaintiff's reliance upon its title to the natural flow of the Yakima River and its tributaries and such price could not have been made but for plaintiff's title to such natural flow waters. That there are vast areas in the valley of the Yakima River of arid and semi-arid land incapable of producing satisfactory crops which will be rendered either permanently useless or of far less value unless plaintiff may, in pursuance of its rights as aforesaid, carry out its plan of disposing of the natural flow of the Yakima River in conjunction with waters stored in plaintiff's reservoirs constructed and to be constructed. That the cost of the reclamation of said areas would be prohibitive if plaintiff be deterred from supplementing stored waters by natural flow



and if the owners of such lands must purchase their entire supply of water from plaintiff's storage works on account of the use of such water prior to the low-water season by defendant and by others in similar manner, and that thereby the success of the Yakima Project and the reimbursement of plaintiff's reclamation fund would be jeopardized.

### XI.

That the point in the Yakima River at which the defendant diverts and will continue to divert water as aforesaid is above the works of the plaintiff from which it supplies the water to the lands hereinabove referred to, by reason of which fact the plaintiff is unable to exercise any control of said water and cannot prevent the defendant from using save by an injunction of this Court. That defendant's stockholders are engaged in extending their irrigation areas by the use of water, unlawfully, and in derogation of plaintiff's rights, diverted by defendant as aforesaid, transfers of *of* land and water are being made from time to time and purchasers are obtaining water titles in good faith. That a multiplicity of suits can only be prevented by a present declaration of plaintiff's right to put to beneficial use within a reasonable time, as against defendant and its stockholders, the waters of the Yakima River unappropriated on aforesaid date of plaintiff's withdrawal, excepting in favor of defendant the aforesaid amounts named in exhibit "A" and such amounts only.

### XII.

That the plaintiff is remediless at law and that no



plain, adequate or speedy remedy may be afforded save in a tribunal exercising chancery powers.

IN CONSIDERATION WHEREOF and forasmuch as plaintiff cannot have any adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why plaintiff should not have the relief prayed for, and make a full and adequate disclosure of all matters aforesaid and according to the best and utmost of its remembrance, knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being expressly waived.

MAY IT PLEASE YOUR HONOR to grant unto the plaintiff a writ of subpoena to said West Side Irrigation Company and to such others as may in the opinion of your Honor appear necessary for the hearing and determination of this case, commanding it on a day certain to appear in answer unto this amended bill of complaint and to abide and perform such order and decree in the premises as to the Court may seem proper and required by the principles of equity and good conscience.

And plaintiff prays that your Honor may grant a permanent injunction commanding the defendant, its officers, agents and employees to abstain from diverting, consuming, using or taking from the Yakima River from and after July 1st in each year, water in excess of the amounts to which it is entitled, as specified in exhibit "A"; and that your Honor furthermore grant a decree quieting the title of this plaintiff pending beneficial use by plaintiff of per-

sons contracting under it, as against defendant to the waters of the Yakima River in excess of the amounts specified in defendant's contract, exhibit "A" throughout the remaining part of each year.

OSCAR CAIN,

United States Attorney.

EDMUND J. FARLEY,

Assistant United States Attorney.

E. W. BURR,

Special Assistant to the United States Attorney.

[Endorsed]: Filed Sept. 26th, 1913. W. H. Hare,  
Clerk. By Edwd. E. Cleaver, Deputy.

---

*In the District Court of the United States for  
the Eastern District of Washington, Southern  
Division.*

No. 228.

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY, a  
Corporation,

Defendant.

**Answer to Amended Bill of Complaint.**

The answer of the West Side Irrigation Company, defendant, to the amended bill of complaint of the United States of America, complainant:

This defendant, saving and reserving to itself all manner of exceptions that may be had to the uncertainties and imperfections of the amended bill of

complaint, comes and answers thereto, or to so much thereof as it is advised is material to be answered, and says;

I.

Admits the allegations of paragraphs I and II of said bill.

II.

It says that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph III of said amended bill, and therefore requires strict proof of the same.

III.

It says that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph IV of said amended bill. That as a prerequisite to the construction of the Yakima project certain conditions were imposed by the Secretary of the Interior, and that among said conditions there was a settlement of water rights of existing canal companies and water users, and denies each any every other allegation contained in said paragraph IV, except it admits that certain of its officers executed the instrument set forth in said amended bill of complaint and marked exhibit "A."

IV.

It denies each and every allegation contained in paragraph V of said amended bill of complaint.

V.

It says that it has no knowledge or information sufficient to form a belief as to each and every of the allegations contained in paragraphs VI and VII of

said amended bill of complaint, and therefore requires proof of the same.

## VI.

Answering paragraphs VIII, IX, X and XI of said amended bill of complaint, the defendant denies each and every allegation contained in said paragraphs.

FURTHER ANSWERING, this defendant says:

## I.

That this defendant corporation is organized solely as an agency for the distribution and delivery of water to the holders of shares of stock in said corporation. That each and all of the shareholders of said corporation are the owners of agricultural land in the Kittitas valley, in Klickitat County, State of Washington, and the amounts of water to which said shareholders are entitled are ascertained and determined by the number of shares of stock which said shareholders own. That each shareholder holds and owns sufficient of said stock to entitle him to a sufficient quantity of water to irrigate the irrigable and agricultural lands of which he is the owner or in possession, and that said corporation was organized solely as an agency with the individual land owners might co-operate in the appropriation, delivery and distribution of water to their individual lands. That for many years prior to the year 1905 this defendant, acting as the incorporated agent of the individual land owners aforesaid, constructed a canal running from the Yakima River to, and adjacent to, their lands, and proceeded to appropriate the waters of the Yakima River for the cultivation and irrigation of



said lands. That from time to time thereafter, and with reasonable diligence, the irrigated and cultivated area of said lands was extended, and the diversion of the waters of said Yakima River was increased, and the water so diverted was applied to the beneficial irrigation of said lands. That at the time of the execution of the instrument set forth as exhibit "A" of the amended bill of complaint, and styled "agreement," the defendant and its shareholders were entitled to the use of sufficient water of the natural flow of the Yakima River, by reason of their appropriation, to irrigate all agricultural lands held and owned by the said shareholders. That the defendant in order to divert, carry and conserve all the water to which its shareholders were entitled, was at the time of the execution of the so-called agreement engaged in, and has since completed, certain betterments and enlargements of its canal, all of which work was done for the purpose of completing the appropriation and delivering to the lands of said shareholders the full amounts of water to which they were entitled from the flow of said Yakima River.

## II.

That long prior to the time when the plaintiff had taken any steps or expended any sum for the building of its storage system, as alleged by it, the rights of the defendant in and to its appropriations for the natural flow of the Yakima River were completed, and of which plaintiff at all times had notice. That at the time of the execution of the so-called agreement of October 21, 1905, the officers of the defendant corporation so executed the same for the purpose of

limiting their rights, for the information of the agents and officers of the United States Reclamation Service, to the amount of water which was necessary for the irrigation of the agricultural lands of its shareholders. That said so-called agreement was not intended to be, and was not in fact, a relinquishment of any of the rights which the defendant or its shareholders had, and was not intended to be, and is not in fact, a transfer of any rights to the plaintiff or to its Reclamation Service.

That said agreement was not executed for the purpose of prejudicing the rights of the defendant to any water which was being beneficially applied to the irrigation of the lands of the defendant's shareholders or which had been appropriated for that purpose. That it was the intent of the officers of the defendant to place the amount of water which the defendant and its shareholders claimed to an amount which the agricultural lands of said shareholders required for their successful irrigation, and it was not the intention of the defendant or its stockholders, and it was not then and is not now their understanding of the terms of said agreement that the defendant and its stockholders should be deprived of the right to apply to their lands the full amount of water to which they were entitled. That in the schedule contained in said agreement no rule of measurement of the water was fixed, and the defendant's officers signed said contract with the understanding and agreement that the rule which defendant had theretofore employed in the measurement and delivery of water to the stockholders, should apply. That the defendant had no

knowledge and now has no knowledge as to the amount of water which it was necessary to divert from the Yakima River in order to supply the full amount of water to which its stockholders are entitled at the point of use, but the sole knowledge of defendant and its stockholders upon the points aforesaid was their custom and knowledge of measuring and applying the water at the point of use. That the officers and stockholders of said corporation were farmers and not skilled in the technical estimate or measurement of flowing waters, but had followed a rule and custom sufficient for their purposes and means. That according to their custom and knowledge, the water which was necessary to supply the stockholders was one inch of water per second of time, measured under a 5-inch pressure at the point of delivery to the land per acre.

That measured under such pressure and at such point of delivery, the amount of water stated in the schedule or contained in said agreement was sufficient to meet the requirements of the defendant and its stockholders, and for that purpose and with such understanding and construction of the contract, the defendant's officers executed the agreement.

And defendant further says that measured in the manner and at the points aforesaid, defendant has not been diverting or flowing through its canal any greater quantity than the amount fixed in said schedule, and that the discrepancy, if any, which exists between the amount fixed in said schedule and the amount diverted from the river is the amount lost



in carriage and by the different methods of measurement.

### III.

And defendant further says that it was represented to it, and is so stated in said agreement, that the sole purpose of said agreement was to permit the United States Reclamation Service to deal with and handle stored water in the Yakima River during the low water season, and defendant says that it has never made any claim to nor does it now claim, nor has it ever diverted any stored water flowing in said stream, but that its appropriation is solely from the natural flow of said river, and that by reason of its appropriation it is entitled at all times to receive from the natural flow of the river the water which it diverts through its canal, and there has been at all times in said river a sufficient amount of the natural flow to supply the diversions of this defendant without injury or prejudice to the plaintiff.

And defendant further says that it was not its intention to abandon or relinquish any of the rights in the Yakima River to which it was entitled, which were necessary for the proper irrigation of the agricultural lands aforesaid, and it has never abandoned said rights, or by any act construed the agreement aforesaid other than as hereinbefore stated. That it has at all times since the execution of said agreement continued the diversion from the Yakima River of a sufficient amount to apply to the lands the full amount fixed in the schedule in said agreement, measured as aforesaid, and has repeatedly notified the officers and agents of the United States Reclamation



Service of its use and its intention to continue to use such amount of water.

And this defendant further says, that any attempt to construe said agreement so as to deprive the defendant of any amount to which it is otherwise justly entitled, or any claim of right so to do, is without consideration and is harsh, inequitable and unconscionable.

And the defendant, having made full answer to all the matters and things contained in the amended bill of complaint, prays that the said bill be dismissed and that the defendant may have decreed to it its reasonable costs in its behalf most wrongfully sustained.

BOGLE, GRAVES, MERRITT & BOGLE,  
Solicitors for Defendant.

[Endorsed]: Filed in the U. S. District Court, Eastern Dist. of Washington. Nov. 14, 1913. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

---

*In the District Court of the United States for  
the Eastern District of Washington, Southern  
Division.*

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

THE WEST SIDE IRRIGATION COMPANY, a  
Corporation,  
Defendant.

**Replication to Answer of Defendant, The West Side Irrigation Company.**

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto saith that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant, without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to ever maintain and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

OSCAR CAIN,

United States Attorney.

E. C. MACDONALD,

Assistant United States Attorney.

E. W. BURR,

Special Assistant to the United States Attorney.

[Endorsed]: Filed in the U. S. District Court, Eastern Dist. of Washington. August 9th, 1912. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

*In the District Court of the United States for  
the Eastern District of Washington, Southern  
Division.*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WEST SIDE IRRIGATION COMPANY, a  
Corporation,

Defendant.

**Opinion.**

FRANCIS A. GARRECHT, U. S. Atty.

E. W. BURR, Special Asst. to U. S. Atty.

BOGLE, GRAVES, MERRITT & BOGLE, for  
Defendant.

RUDKIN, District Judge.

The West Side Irrigation Company was organized and created under the Laws of the Territory of Washington, on the 5th day of June, 1889, for the purpose of constructing ditches and flumes to convey water from the Yakima River to irrigate lands and water stock in the West Kittitas Valley, Kittitas County, Washington Territory. The original incorporators and stockholders were farmers owning lands under the line of the proposed canal, whose chief object was to obtain a supply of water to irrigate their farms, and for stock and domestic purposes. The corporation thus formed has no income and pays no dividends. Each stockholder is entitled

to divert and use the water conducted through the canal in proportion to the amount of his capital stock, and contributes to the expense of maintaining and repairing the canal in the like proportion. In other words, the corporation is a mere agency to construct, maintain, and repair the canal, and to conduct and distribute water through the same for the use and benefit of its stockholders. Construction work on the canal commenced immediately after the incorporation and was completed within a couple of years thereafter; but the ditch has been cleaned and repaired, and no doubt to some extent enlarged, since then. No measurements have ever been made or taken by the defendant company of the volume of water conducted through the canal; but it now claims that it requires four thousand inches of water, measured according to the system or module employed by it to properly irrigate the lands underlying the canal and owned by its stockholders. During the year 1905 the government had under contemplation the construction of storage reservoirs and irrigation works in the Yakima Valley under the Act of Congress of June 17, 1902 (32 Stat. 388), commonly known as the "Reclamation Act," and had withdrawn or appropriated all of the then unappropriated waters of the Yakima River and its tributaries under the Act of the Legislature of the State of Washington of March 4, 1905 (Laws 1905, p. 180), entitled, "An Act relative to the appropriation of waters of the State for irrigation purposes, granting the United States the right of exercising the power of eminent domain in acquiring



lands, water and other property for rights of way, and for reservoir and other irrigation works, granting to the United States certain rights in State lands and waters of the State relating to water-users' associations, and declaring an emergency." The Secretary of the Interior refused to approve the plan commonly known as "The Tieton and Sunnyside Projects," or to enter upon the construction of irrigation works or storage reservoirs in the Yakima Valley, except upon compliance with certain conditions, among which were the following:

"First. The adjustment of all conflicting claims of those who are appropriating water from the Yakima River or any other body of water, for irrigation, power or any other purpose.

"Second. The determination of all suits now pending to prevent the diversion of water from the Yakima River to the Yakima Indian Reservation, and any and all other litigation that in any way tends to embarrass or restrict the appropriation of the waters from said river or any other body of water needed for the irrigation of the lands under said proposed projects."

The attitude of the Government was explained to the water users of the Kittitas and Yakima Valleys by officers or representatives of the Reclamation Service, and local committees were appointed to obtain a satisfactory settlement and adjustment of all claims to water from the Yakima River and its tributaries to meet the demands and requirements of the

Secretary of the Interior. At the instance of one of these committees the defendant company signed the following agreement:

“The West Side Irrigating Company, to PUBLIC  
Between the Appropriator Taking Water from  
the Yakima River and Its Tributaries.

WHEREAS, The Reclamation Service of the United States has been requested to investigate the water resources of the Yakima Water Shed with a view to the further development and increase of irrigation therein, under the provisions of the Act of Congress approved June 17, 1902 (32 Stat. 388), known as the Reclamation Act, and whereas the officers of the Reclamation Service in preliminary investigation have found that in all the low water flow of the Yakima River and its tributaries has been appropriated and is now being diverted by the various canals within said watershed and that in order to irrigate additional lands within said watershed it will be necessary to store the surplus waters of the flood season, and whereas, no irrigation project to be undertaken by the United States within the said watershed can be recommended as feasible unless the quantity of water to which each present user from the Yakima River and its tributaries is entitled be first definitely ascertained and agreed to, and whereas, the undersigned claim certain quantities of water from the Yakima River and its tributaries and are willing to limit their claim to the said waters to the quantities of water designated in the following schedule:

## SCHEDULE.

Cubic Feet per Second.		
April to August Inclusive.	September.	October.
80	80	34

Now, therefore, in order to avoid litigation, to encourage the storage of water in the Yakima watershed and to secure the indirect benefit derived from further irrigation through Federal enterprise, each subscriber to this agreement or to a copy thereof, differing only as to the quantities of water specified, agreed to, limit and does limit its respective rights of appropriation from said Yakima River and its tributaries to the above specified amounts, provided, that it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise, in order to secure the benefits above referred to and shall not bind any party hereto in any event, unless the determination to construct storage and irrigation works by the United States under the Reclamation Act shall be announced by the Secretary of the Interior within two years from the date upon which he is furnished with properly authenticated copies of the agreements of this form duly executed by or on behalf of such proportion of the claimants of the waters of the Yakima River and its tributaries as shall be satisfactory to the Secretary of the Interior. In witness whereof, the undersigned has

caused these presents to be executed in its corporate name, by its president, and attested by its secretary, and its corporate seal to be affixed, by authority of its board of directors, heretofore duly made and entered this 21st day of October, 1905.

THE WEST SIDE IRRIGATION COM-  
PANY.

By MITCHELL STEVENS,  
Vice-President."

The determination to construct storage and irrigation works in the Yakima Valley was announced soon after the execution of the above agreement, and well within the two years specified, and the government has expended upwards of eight million dollars in the construction and maintenance of such works since that time. The present suit was instituted to restrain the defendant from diverting water from the Yakima River in excess of the quantity set forth in this so-called limiting agreement, and the case is now before the Court for final hearing on testimony taken before a commissioner appointed for that purpose. It is conceded throughout the testimony that the defendant has diverted water from the river in excess of eighty cubic feet per second of time, and it asserts the right to do so upon three grounds; first, because the limiting agreement was *ultra vires* and void; second, because the water should be measured at the several points where it is diverted from the canal by the different stockholders or users, and not at the intake of the canal, or at least that such was the understanding of the defendant; and third, that the defendant at all times claimed the right to divert



and use four thousand inches of water measured according to the system or module adopted by it; that it was represented to the defendant that eighty cubic feet per second was the equivalent of the four thousand inches thus measured, while in truth and in fact the four thousand inches, as measured by the defendant, is the equivalent of upwards of ninety cubic feet per second; and it is claimed that the difference between the eighty cubic feet per second, measured at the intake, and the four thousand inches as measured by the defendant at the points of delivery to the different stockholders is 24.6 cubic feet per second. In other words, the defendant claims and asserts the right to divert from the river 104.6 cubic feet per second, while the Government claims that it is limited to 80 cubic feet per second.

1. The defense of *ultra vires*, or, more properly speaking, the defense that the execution of this limiting agreement was without the scope of authority of the officers who executed it and authorized its execution, cannot prevail at this time. In the first place, the authority of these officers is not directly challenged by the answer, and want of authority is a special defense which must be specially pleaded. But in any event, and regardless of the pleadings, all the stockholders had notice of the execution of the contract soon after it was signed and it then became their imperative duty to either abide by the contract or promptly disavow the unauthorized acts of the corporate officers and bring notice of such disavowal home to the Government.

But instead of so doing a called meeting of the stockholders was held on the 2d day of January, 1906, for the purpose of discussing and considering the contract, and after full discussion a motion was adopted "That no action be taken to relinquish any water at the present time." The corporation, its officers and stockholders maintained a discreet, if not an intentional silence, concerning this action for almost two years, and permitted the Government to proceed with its work and with its vast outlay of money in the belief that all water disputes had been settled and adjusted in accordance with its requirements. That the defendant and its stockholders, under those circumstances, should now be estopped to question the authority of the officers or the validity of the contract, does not, in my opinion, admit of question.

10 Cyc. 1076.

Indianapolis Rolling Mill v. St. Louis etc. Rd.,  
120 U. S. 256.

Penn. Ry. Co. v. Keokuk & H. Bridge Co.,  
131 U. S. 371, 381.

Construction Co. v. Fitzgerald, 137 U. S. 109.

Augusta, T. & G. R. Co. v. Kittle, 52 Fed. 63,  
73.

2. The contention that the water should be measured at the many points where diverted from the canal for use of the stockholders, instead of at the intake of the canal where the water is diverted from the river, or that the officers and stockholders of the defendant could have so understood, does not impress me. The question of the settlement and adjustment of the conflicting claims to water from

the Yakima River and its tributaries was under discussion for months. As early as April 1st, 1905, the following motion was adopted at a meeting of the stockholders of the defendant company:

“Motion by W. A. Stevens, seconded by J. N. Burch, that the stockholders of the West Side Irrigation Co. make claim to the Government Reclamation Bureau to four thousand inches of the waters of the Yakima river, and the board of Trustees to notify Splawn and Ellison to make their claim to water to flow through the company's canal and in case they do not make their claim the board of trustees to claim a thousand inches for Splawn and Ellison.”

It may here be stated by way of explanation that the claims of Splawn and Ellison are in no wise connected with the present claim of the defendant company. The object and purpose of the Government was to ascertain and fix the quantity of water diverted from the river, not the quantity actually used for the purpose of irrigation. True, no doubt, some of the seepage water found its way back into the river, but that is equally true, though perhaps to a less extent of water actually used for irrigation. But the main point is, that the purpose of the Government was unquestionably to fix the amount of the diversion at the point of diversion. No man of average intelligence could *of* understood otherwise, and a reading of the record convinces me that the officers and stockholders of the defendant company measure up to that standard.



3. The eighty cubic feet per second is conceded to be the equivalent of four thousand inches measured under a four-inch pressure, and I feel that I am well within the record in stating that the latter unit has almost become the standard of measurement in the locality in question. Such is the unit prescribed, in numerous decrees of the courts of Kittitas County, extracts of which are appended to the Government's brief and not denied by the defendant. Furthermore, it was testified at the trial that the defendant's module of measurement was the same as that prescribed in one of these decrees. The officers and stockholders of this company are not as ignorant of the ways of the world and of water measurements as they now profess to be. They have lived in the midst of irrigation and have been surrounded by, if not actually involved in litigation over water rights for years. The company had its origin in litigation over the waters flowing in the tributaries of the Yakima River, and its records repeatedly refer to inches of water and other matters showing a general knowledge of water measurements. And, without discussing the subject further, I will only add that the record convinces me that the officers and stockholders of this company are fully competent to understand and appreciate their rights and abundantly able to protect them. Furthermore, the purpose of this agreement was not to fix or establish existing rights, but to fix and prescribe the rights which the defendant company would have and exercise in the future. The defendant was under no obligation to sign the agreement or to relinquish



any rights it might have, and the Government was under no obligation to take up irrigation works in the Yakima Valley.

Both parties, however, had or claimed rights in the waters of the river, and they undertook for reasons satisfactory to themselves to compromise and settle their rights. This settlement and compromise was an adequate consideration for their agreement, and their course was in full accord with the policy of the law. Such agreement should not be set aside except for cogent reasons, established by clear and convincing proof. I know that promises made in aid of public improvements are lightly made and lightly regarded, and are too often followed by repentance and repudiation; but this does not detract from their legal obligation or relieve courts of the necessity of enforcing them in a proper case.

For the reasons thus stated I am satisfied that the plaintiff is entitled to the relief prayed for in the complaint whenever the diversion of a greater quantity of water from the river will interfere with or prejudice the rights of the Government.

But as said in a recent case pending in this court:

“The Government, like an individual, can appropriate only so much water as it applies to beneficial uses and can only restrain a diversion which operates to its prejudice.”

In that case a diversion after the first of July of each year was restrained, the Court finding that prior to that time no prejudice would result to the Government. It may be that in exceptional years the date thus fixed will be too late; the decree should

be definite and certain and probably that date could be fixed upon arbitrarily, the Court reserving the right to modify the decree whenever exceptional circumstances require a modification. This question can be determined, however, when the final decree is submitted for the approval of the Court. Let a decree be prepared accordingly.

Filed January 31, 1916. W. H. Hare, Clerk. By E. E. Cleaver, Deputy.

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*In the District Court of the United States for the Eastern District of Washington, Southern Division.*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEST SIDE IRRIGATION COMPANY, a Corporation,

Defendant.

**Decree.**

This cause coming on regularly to be heard, plaintiff appearing by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and E. W. Burr, Esquire, Special Assistant Attorney, and Messrs. Bogle, Graves, Merritt & Bogle appearing for the defendant, and the testimony having been submitted and the case having been argued, and the Court now being fully advised, it is

CONSIDERED and ADJUDGED that the limiting agreement entered into between plaintiff and defendant on the 21st day of October, 1905, is valid and binding on said defendant; and it is

ORDERED, ADJUDGED and DECREED that the defendant be, and hereby is, perpetually enjoined from diverting water from the Yakima River into its canal in excess of eighty (80) cubic feet per second from and after July 1st to September 30th; and in excess of thirty-four (34) feet in October during each irrigation season; the said diverted waters to be measured as near to the headgate of defendant's canal as practicable, but below the diversion therefrom of the so-called Ellison and Splawn ditch in the West Half of the West Half, and near the East and West center line of Section Thirty-four (34), Township Nineteen (19) North, of Range Seventeen, E. W. M.

PROVIDED, however, that the Court reserves jurisdiction to modify this decree so as to prevent the diversion of water prior to the first day of July in any year when such modification is necessary to preserve the rights of the plaintiff, and whenever a diversion in excess of eighty (80) cubic feet per second prior to July first in any year will interfere with or prejudice the rights of plaintiff. It is further

ORDERED, ADJUDGED and DECREED that plaintiff have and recover its costs and disbursements herein incurred.

Done in open court this 19th day of February,  
A. D. 1916.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed for Record in the U. S. District Court, Eastern Dist. of Washington. Feby. 21st, 1916. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.

Entered in J. & D. Register, Vol. 1, page 127.

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*In the District Court of the United States, for the  
Eastern District of Washington, (Southern  
Division).*

UNITED STATES OF AMERICA,  
Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY, a  
Corporation,

Defendant.

**Petition on Appeal.**

To the Honorable FRANK H. RUDKIN, District  
Judge:

The above-named corporation, The West Side Irrigating Company, conceiving itself aggrieved by the decree made and entered in the above-entitled cause on the 21st day of February, 1916, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith and it prays that this appeal



may be allowed and that a transcript of the evidence, record, all proceedings, papers and exhibits upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 17th day of August, A. D. 1916.

H. J. SNIVELY,

Attorney for the West Side Irrigating Company.

The foregoing claim of appeal is allowed.

Dated this 18th day of August, A. D. 1916.

FRANK H. RUDKIN,

District Judge.

Service admitted this 18th day of August, A. D. 1916.

FRANCIS A. GARRECHT,

United States District Attorney and Solicitor for  
Complainant.

Filed in the U. S. District Court, Eastern District  
of Washington. Aug. 18, 1916. Wm. H. Hare,  
Clerk.

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*In the District Court of the United States, for the  
Eastern District of Washington, (Southern  
Division).*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY, a  
Corporation,

Defendant.

**Assignment of Errors on Appeal.**

Now, on the 17th day of August, 1916, came The West Side Irrigating Company, a corporation, by its solicitor, H. J. Snively, and says that the decree rendered and entered in said cause is erroneous and against the just rights of said The West Side Irrigating Company for the following reasons:

First. Because the Amended Complaint upon which said decree was rendered does not state or set forth any facts or equities entitling the complainant to any equitable relief.

Second. Because the complainant is not authorized by any act of Congress or any other lawful authority to maintain this suit or any suit of this character.

Third. Because the United States is not vested by law with any authority, nor is the Secretary of the Interior, nor the Attorney General of the United States, to maintain a suit of this character, the United States not being a party in interest and the benefits of said suit accruing entirely to private interests.

Fourth. That said suit was brought without any legally lawful authority and it was erroneous to enter any decree therein for that reason.

Fifth. That the record shows that the court was without jurisdiction of any kind or character to try, hear or determine this controversy, or enter any decree therein, other than a decree of dismissal for the reason that no property or other right of the

United States of America was involved in this suit and said United States of America is not vested with any authority, power or right to engage in litigation of this nature.

Sixth. Because the evidence showed that the officers of The West Side Irrigating Company had no authority to enter into the alleged agreement dated the 21st day of October, 1905, upon which the decree of the court in this case is founded.

Seventh. Because the evidence showed that the said alleged agreement upon which the decree in this cause is founded purporting to be entered into on the 21st day of October, 1905, was made without any authority upon the part of the said corporation and was without the powers of said corporation. The Articles of Incorporation of said corporation only authorized the said corporation to carry and distribute water and to in no manner sell or dispose of water, or own water. Said alleged agreement was therefore null and void.

Eighth. Because the evidence showed that said alleged agreement was not an agreement, had no mutuality, was without any consideration, and was unenforceable.

Ninth. Because the evidence showed that said alleged agreement was indefinite and uncertain and founded upon a mistake in this, to wit: The officers of The West Side Irrigating Company who executed the said alleged agreement believed that eighty (80) cubic feet of water per second of time was equivalent to four thousand (4,000) inches of

water under the measurement in use by them; the evidence showed that they measured their water in a certain way by inches under pressure and they were informed by the engineers of the complainant, who had technical knowledge upon the subject, that eighty (80) cubic feet of water per second of time was equivalent to four thousand (4,000) inches of water according to the measurement of the said corporation in use at that time, and having no technical knowledge upon the subject, they accepted this statement of complainant's engineers, and instead of putting into said alleged agreement four thousand (4,000) inches of water under pressure, as used by said irrigating company at that time, eighty (80) cubic feet per second of time was inserted; the evidence showed that the said officers intended to reserve all of the water which had been provided for the use of the lands under said irrigating company's canal, which they knew to be four thousand (4,000) inches, as measured by the said company, under pressure; and the said officers only executed said alleged agreement upon the supposition that said eighty (80) cubic feet per second of time was equivalent to said four thousand (4,000) inches as measured by said company at that time under pressure, whereas, in truth and in fact, it is shown from the evidence that eighty (80) cubic feet is not the equivalent of four thousand (4,000) inches as measured by said company, but that ninety and four-tenths (90.4) cubic feet per second of time is the equivalent thereof.



Tenth. Because the evidence showed that the intention of the officers of the irrigating company was to release only that portion of the waters of the said river not required to irrigate the lands of the stockholders of said company, but that it was the intention of the said officers to reserve all of the water required for the full and complete irrigation of the lands of the stockholders of the said company. It is shown from the evidence and admitted facts in the case, that under the decree of the Court as rendered and entered in this cause that the said eighty (80) cubic feet of water is insufficient to fully irrigate the lands of the stockholders of the said company or to furnish the amount of water to which the said stockholders are entitled in virtue of their several appropriations and rights. That it was manifestly not the intention of the said officers and certainly not within their power or authority to release to the United States for the irrigation of other lands in which their stockholders are not interested, water required for the irrigation of said stockholders' lands.

Eleventh. That said alleged agreement does not provide a place for the measuring of said water, and the evidence showed that the said defendant corporation had no measuring apparatus at the place that it took water from the Yakima River, but that it measured the water through boxes placed in the service laterals along the ditch; those service laterals measured water by inches under pressure. That the evidence showed that it was never contemplated by any of the parties to said alleged agreement that the water taken from the river by said irrigating cor-

poration should be measured at the intake; that the evidence showed that the defendant corporation's canal for a long distance runs along the banks of the Yakima River through gravel, and that a large portion of said water runs back into the river before it reaches any of the distributing laterals. That when a full head of water is running in said canal, at least twenty (20) cubic feet per second of time of the said water runs back into the Yakima River, and never enters the distributing ditches of the defendant corporation; that thus, instead of getting even eighty (80) cubic feet of water per second of time, the defendant corporation actually gets only sixty (60) cubic feet or less, of water per second of time.

Twelfth. Because in view of the uncertainty of said alleged agreement as to the place of measurement and the evident intention of the parties as shown by the evidence and the mistake made in transposing the four thousand (4000) inches as measured by said corporation into eighty (80) cubic feet, even if said agreement otherwise would be regarded as valid by the Court, the equities of the case as shown by the evidence and record does not authorize or uphold any other decree than a decree providing for the actual distribution from the Yakima River of water sufficient for the irrigation of the lands of the said stockholders of said corporation; that no other decree would be just and that such a decree alone would carry out the intention of all the parties; that is to say, the decree, in the event of said alleged agreement being held valid otherwise should provide that there should be measured out to said corpora-

tion sufficient water to irrigate the lands of the stockholders thereof, to wit, about seven thousand (7000) acres of land, in the manner and quantity in which they had been using such water, and in which they contemplated using it and that over and above this any right to water out of the Yakima River is waived by said agreement. That it is an injustice to the stockholders of said corporation to be arbitrarily cut down in the use of water below their requirements.

Thirteenth. Because the evidence failed to show that the United States performed the conditions of said agreement.

Fourteenth. Because the evidence failed to show that the complainant had any right or claim against The West Side Irrigating Company.

Fifteenth. Because the evidence showed that the defendant corporation is only interested in the agency and that the real parties in interest in the water carried by said corporation are the owners of the land. That the use of said waters is appurtenant to said land. That the said corporation had no right to release any interest in said land; that said land is generally owned by husband and wife under the laws of the State of Washington; that the laws of the State of Washington covering the rights of husband and wife are known as community property laws, and section 5918 of Remington and Ballinger's Annotated Codes and Statutes of Washington is as follows:

“The husband has the management and control of the community real property, but he shall



not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife; Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon. (Cd. '81, 2410; 1 H. C. 1400.)”

and under said provision any conveyance of property not made by a wife and husband jointly is void according to the decisions of the Supreme Court of the State of Washington. That if said agreement is given effect, as it is by the decree complained of, the effect will be to transfer the interests of the wives of the owners of said community property in real estate in contravention to the above Statute.

Sixteenth. Because the evidence showed that the act of the Trustees and officers of the defendant corporation in signing the said alleged agreement was repudiated on the second day of January, 1906, and that at that time the United States Reclamation Service had not expended any money in virtue of said alleged agreement, or performed any of its conditions. That under the evidence the said alleged agreement was not even *prima facie* valid, but was invalid; that the Court erred in holding that notice



of its repudiation had to be given to the reclamation service. Said officers were agents only of the corporation and the Court erred in holding that the United States was entitled to treat said officers to act and bind the stockholders.

Seventeenth. Because the evidence showed that the alleged agreement, if properly construed by the learned District Judge, is inconstruable and should not be enforced in a court of equity.

Eighteenth. Because it is shown by the evidence that complainant is not entitled to any relief whatever in a court of equity.

Nineteenth. Because the evidence fails to show that the United States is injured or that any interest represented by it is injured by the defendant corporation under the quantity of water claimed by it from the Yakima River, or that the United States can put said water to a beneficial use.

Twentieth. Because the evidence showed that the complainant is in a court of equity, praying specific performance of an alleged agreement without showing any consideration therefor.

Twenty-first. Because the evidence failed to show that Mitchell Stevens, vice-president of The West Side Irrigating Company, had power to bind said company or that his act was in any manner authorized by said company.

Twenty-second. Because said alleged agreement was not executed under the seal of the said company by any authorized officer of said company, or by the authority of the stockholders thereof.

Twenty-third. Because the Court erred in hold-

ing that eighty (80) cubic feet per second is conceded to be the equivalent of four thousand (4000) inches as measured by the defendant corporation.

Twenty-fourth. Because the Court erred in finding from the evidence that the object in purpose of the Government was to ascertain and fix the quantity of water diverted from the river and not the quantity actually used for irrigation. All of the evidence taken together, in view of the surrounding conditions of the parties will show that in making this alleged agreement certainly the defendant corporation had in mind the quantity of water actually used for the purpose of irrigation and not the quantity diverted from the river.

WHEREFORE, The West Side Irrigating Company prays that said decree be reversed and that said court may be directed to enter a decree dismissing the Bill of Complaint or to modify the same to the end that the stockholders of said Irrigating Company shall be awarded the amount of water which they require for the full irrigation of all their lands under the canal of the said irrigating company.

H. J. SNIVELY,

Solicitor for The West Side Irrigating Company.

Service of the above Assignment of Errors on appeal accepted this 18th day of August, 1916.

FRANCIS A. GARRECHT,

United States District Attorney and Solicitor for Appellee.

*In the District Court of the United States for  
the Eastern District of Washington, Southern  
Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY, a  
Corporation,

Defendant.

**Order of Court Fixing Amount of Bond on Appeal.**

Upon application of the defendant and plaintiff on  
appeal the bond on appeal in this case is hereby fixed  
in the sum of two hundred dollars (\$200).

FRANK H. RUDKIN,

District Judge.

Filed in the U. S. District Court, Eastern District  
of Washington. Aug. 18, 1916. Wm. H. Hare,  
Clerk.

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*In the District Court of the United States, for the  
Eastern District of Washington, Southern  
Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY, a  
Corporation,

Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS: That we, The West Side Irrigating Company, a corporation, as principal and Mitchell Stevens and J. H. Prater, both of Kittitas County, State of Washington, as sureties, are held and firmly bound unto the United States of America in the sum of two hundred dollars (\$200), lawful money of the United States, to be paid to the United States of America, jointly and severally, for which payment well and truly to be made, said principal and sureties, their respective and several successors, heirs and representatives, jointly and severally are held and firmly bound.

Sealed with our seals and dated this 17th day of August, A. D. 1916.

The condition of this obligation is such that, whereas the principal, The West Side Irrigating Company, a corporation, is aggrieved by a decree in the above-entitled cause entered on the 21st day of February, 1916, whereby the said The West Side Irrigating Company was perpetually enjoined from diverting water from the Yakima River into its canal in excess of eighty cubic feet per second from and after July 1st to September 30th and in excess of thirty-four cubic feet in October, during each irrigation season, and to pay the costs and disbursements herein incurred and as more fully specified in the petition on appeal;

And whereas, the said The West Side Irrigating Company, a corporation, is about to appeal from said



decree to the United States Circuit Court of Appeal for the Ninth Circuit.

Now, therefore, if said appellant shall cause said appeal to be duly entered in the United States Circuit Court of Appeals for the Ninth Circuit and shall duly prosecute said appeal to effect, and if it fails to make its plea good, without fraud or delay to answer all damages and costs than this obligation shall be void, otherwise to be in full force and effect.

Dated this 17th day of August, A. D. 1916.

THE WEST SIDE IRRIGATING COMPANY, a Corporation.

By H. J. SNIVELY,

Its Solicitor.

MITCHELL STEVENS,

J. H. PRATER,

Sureties.

County of Yakima,

State of Washington,

Eastern District of Washington,—ss.

Mitchell Stevens and J. H. Prater, being duly and severally sworn, each for himself and one not for the other, depose and say: That he is a citizen of said district and a resident of Kittitas County, State of Washington, and a freeholder therein; that he, the said Mitchell Stevens, is worth the sum of \$50,000 over and above all of his debts and liabilities in property exempt from execution, and that he, the said J. H. Prater, is worth the sum of \$15,000 over and above all of his debts and liabilities in property exempt from execution; and each for himself and one

not for the other further says, that he is not an attorney or counsel at law, clerk of the court, Sheriff or other officer of said court or any other court.

MITCHELL STEVENS.

J. H. PRATER.

Subscribed and sworn to before me this 17th day of August, A. D. 1916.

[Seal]

E. A. FERRIS,

Notary Public in and for the State of Washington,  
Residing at North Yakima, Washington.

My Commission Expires December 7, 1917.

The foregoing bond is approved as to form and sufficiency of security and the manner of execution.

Dated this 18th day of August, A. D. 1916.

FRANK H. RUDKIN,

District Judge.

Service admitted this 18th day of August,  
A. D. 1916.

FRANCIS A. GARRECHT,

United States District Attorney and Solicitor for  
Complainant.

Filed in the U. S. District Court, Eastern District of Washington. Aug. 18, 1916. Wm. H. Hare, Clerk.

*In the District Court of the United States, for the  
Eastern District of Washington, (Southern  
Division).*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,  
a Corporation,

Defendant.

**Citation on Appeal.**

To the President of the United States, United States  
of America, and to FRANCIS A. GARRECHT,  
United States District Attorney for the State  
of Washington, GREETINGS:

YOU ARE HEREBY CITED AND ADMON-  
ISHED to be and appear in the United States Cir-  
cuit Court for the Ninth Circuit to be held in the  
city of San Francisco, in the State of California,  
within thirty (30) days from the date of this writ  
pursuant to an appeal filed in the clerk's office of  
the District Court of the United States, for the East-  
ern District of Washington, Southern Division,  
wherein The West Side Irrigating Company, a cor-  
poration, is plaintiff and you are defendant in error,  
to show cause, if any there be, why judgment in the  
said appeal mentioned should not be corrected and  
speedy justice should not be done to the parties in  
that behalf.

Witness the Honorable EDWARD DOUGLAS  
WHITE, Chief Justice of the Supreme Court of the

United States of America, this 18th day of August,  
A. D. 1916.

FRANK H. RUDKIN,  
District Judge.

[Seal]

Attest: W. H. HARE,  
Clerk.

I hereby, this 18th day of August, A. D. 1916, accept due and personal service of this citation, on behalf of the United States of America, appellee.

FRANCIS A. GARRECHT,  
United States District Attorney.

Filed in the U. S. District Court, Eastern District of Washington. Aug. 18, 1916. Wm. H. Hare, Clerk.

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*In the District Court of the United States, for the  
Eastern District of Washington, (Southern  
Division).*

UNITED STATES OF AMERICA,  
Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,  
a Corporation,

Defendant.

**Order Extending Time to and Including October 17,  
1916, to File Record, etc.**

This cause coming on for hearing upon the motion of claimant for an order to be entered herein enlarging and extending the time within which the clerk of this court may prepare, and the said The West



Side Irrigating Company, appellant, may file with the clerk of the Circuit Court of Appeals for the Ninth Circuit, to and including the 17th day of October, 1916, and it appearing to the Court that good and sufficient cause exists for so extending and enlarging the time within which such record may be filed and said cause may be docketed.

NOW, THEREFORE, it is by the Court ORDERED that the time allowed by law and the rules in such cases made and provided within which the clerk of this court is required to prepare, and the above named The West Side Irrigating Company, appellant, is required to file with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the record in this case and to docket this case in said Circuit Court of Appeals, shall be and the same is hereby extended to and including the 17th day of October, A. D. 1916.

Done in open court this 16th day of September, A. D. 1916.

FRANK H. RUDKIN,  
District Judge.

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*In the District Court of the United States, for the  
Eastern District of Washington, (Southern  
Division).*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,  
a Corporation,

Defendant.

**Motion to Extend Time to and Including October 17,  
1916, for Filing Record, etc.**

Comes now The West Side Irrigating Company, appellant, and moves the Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, to extend the time for the preparation and filing of the record on appeal in this case to and including the 17th day of October, 1916.

This motion is based upon the affidavit hereto attached and the files in said cause.

H. J. SNIVELY,  
Solicitor for The West Side Irrigating Company.

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*In the District Court of the United States, for the  
Eastern District of Washington, (Southern  
Division).*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,  
a Corporation,

Defendant.

**Affidavit of H. J. Snively.**

Eastern District of Washington,  
Southern Division,  
County of Yakima,—ss.

This day personally appeared before me, the undersigned notary public in and for said county

and state, H. J. Snively, who, having been first duly sworn, upon oath deposes and says: That he is the only attorney for the appellant, the West Side Irrigating Company, a corporation, in the above-entitled cause on appeal to the Circuit Court of Appeals, for the Ninth Circuit and that for the past several weeks he has been suffering with an infected foot, which has prevented him from studying the record in this case sufficiently to determine what was necessary upon appeal and has been delayed because thereof until the present time in preparing his praecipe for the clerk of the court and because thereof the record has not been completed; that thirty (30) days' additional time is necessary to complete the same.

H. J. SNIVELY,

Subscribed and sworn to before me this 15th day of September, A. D. 1916.

E. A. FERRIS,

Notary Public in and for the State of Washington,  
Residing at North Yakima, Washington.

Filed in the U. S. District Court, Eastern District of Washington, Sep. 16, 1916. Wm. H. Hare, Clerk.

*In the District Court of the United States, for the  
Eastern District of Washington, (Southern  
Division).*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WEST SIDE IRRIGATING COMPANY,  
a Corporation,

Defendant.

**Stipulation Re Transmission of Original Exhibits to  
Appellate Court.**

It is hereby stipulated by and between the attorney for the plaintiff and the attorney for the defendant that all of the original exhibits in the above-entitled case may be sent to the Circuit Court of Appeals for the Ninth Circuit pending the appeal in said Circuit Court.

(Signed) FRANCIS A. GARRECHT,

Attorney for Plaintiff.

H. J. SNIVELY,

Attorney for Defendant.

[Endorsements]: Stipulation. Filed October 3, 1916. W. H. Hare, Clerk. By Edward E. Cleaver, Deputy.



*In the District Court of the United States, for the  
Eastern District of Washington, (Southern  
Division).*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WEST SIDE IRRIGATING COMPANY,  
a Corporation,

Defendant.

**Order Directing Transmission of Original Exhibits  
to Appellate Court.**

Upon the stipulation in this cause providing for the sending of the original exhibits as part of the original record being presented to the Court in open court, Francis A. Garrecht, attorney for the plaintiff and H. J. Snively, attorney for the defendant being present and each agreeing thereto in open court,—

IT IS ORDERED that the clerk of this court do send as part of the original record upon appeal all of the original exhibits upon file in this cause in this court, and that the same shall have all of the effect that the same would have if the same were duly copied and certified to by the clerk of this court as part of the records on appeal, and shall be, in every way, treated and deemed to be part of the record upon appeal in this case.

Done in open court this 3d day of October, A. D.  
1916.

FRANK H. RUDKIN,  
Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 3, 1916. Wm. H. Hare, Clerk. E. E. Cleaver, Deputy.

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*In the District Court of the United States, for the Eastern District of Washington, (Southern Division).*

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,  
a Corporation,

Defendant.

**Praecipe for Transcript on Appeal of The West Side Irrigating Company.**

To W. H. Hare, Clerk of the Above-entitled Court:

You will please prepare for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, on the appeal of The West Side Irrigating Company, appellant, in the above-entitled case, a certified transcript of the following papers now on file and of record in this case:

- 1st. Amended Complaint.
- 2d. Answer to Amended Complaint.
- 3d. Reply.
- 4th. Opinion of the Court.
- 5th. Decree.
- 6th. Petition for Appeal.
- 7th. Assignment of Errors.
- 8th. Order Fixing Bond.
- 9th. Bond on Appeal.

- 10th. Order Allowing Appeal.
- 11th. Citation on Appeal.
- 12th. Order Extending Time for Making Up Record.
- 13th. Evidence upon Which Decree was Rendered and Exhibits.
- 14th. Stipulation as to Exhibits.
- 15th. Order as to Exhibits.

H. J. SNIVELY,

Solicitor for The West Side Irrigating Company,  
Appellant.

Filed in the U. S. District Court, Eastern District  
of Washington. Sep. 13, 1916. Wm. H. Hare,  
Clerk. E. E. Cleaver, Deputy.

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*In the District Court of the United States, for the  
Eastern District of Washington, (Southern  
Division).*

No. 228.

UNITED STATES OF AMERICA,

Complainant,

vs.

THE WEST SIDE IRRIGATING COMPANY,  
a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

I, W. H. Hare, Clerk of the District Court of the  
United States in and for the Eastern District of  
Washington, do hereby certify that the foregoing  
typewritten pages constitute and are a full, true, cor-

rect and complete copy of so much of the record, pleadings, orders and other proceedings had in said action, as the same remain of record and on file in the office of the Clerk of said District Court, as called for by the defendant and appellant in its praecipe; and that the same constitute my return to the order of appeal from the judgment of the District Court of the United States for the Eastern District of Washington to the Circuit Court of Appeals for the Ninth Circuit, lodged and filed in my office on the 18th day of August, 1916.

I further certify that I hereto attach and herewith transmit the original Citation issued in said cause.

I further certify that I hereto attach and herewith transmit the original exhibits introduced in said cause, being plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," "O" and "P," and Defendant's Exhibits 1, 2, 3 and 4.

I further certify that the fees of the Clerk of this court for preparing and certifying to the foregoing typewritten record amount to the sum of seventeen dollars and seventy-five cents (\$17.75), and that the same has been paid in full by H. J. Snively, attorney for the defendant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Eastern District of Washington, at Spokane, Washington, this 6th day of October, A. D. 1916.

[Seal]

W. H. HARE,  
Clerk.



[2\*] *In the District Court of the United States for  
the Eastern District of Washington, Southern  
Division.*

No. 228.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE WEST SIDE IRRIGATING COMPANY, a  
Corporation,

Defendant.

**Proceedings Had July 1, 1914.**

To the Honorable FRANK H. RUDKIN, Judge of  
the Above-entitled Court:

Pursuant to the order heretofore and on the 17th  
day of September, 1913, made in the above-entitled  
cause, referring said cause to me, as Special Exam-  
iner, to take the testimony and proofs of the parties  
and report the same to the Court, at 10 o'clock A. M.  
the 1st day of July, 1914, in the Federal Building,  
in the city of North Yakima, Washington, and  
within said District, personally appeared before me  
the plaintiff, by its solicitors, F. M. Garrecht, Esq.,  
United States District Attorney for said District,  
and E. W. Burr, Esq., Special Assistant United  
States District Attorney, and the defendant, by its  
solicitor, Carroll B. Graves, Esq., and thereupon tes-  
timony and proofs were offered and proceedings had

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\*Page-number appearing at foot of page of original certified Tran-  
script of Record.

from day to day and place to place to suit the convenience of witness and solicitors, as is more specifically stated in the report hereto annexed, as follows, to wit:

[3] IT IS STIPULATED: That the plaintiff pursuant to the act of the legislature of the State of Washington, approved March 4, 1905 (L. 1005, p. 180), did on the 10th day of May, 1905, file in the office of the commissioner of Public Lands of the State of Washington, a notice of withdrawal of the then unappropriated waters of the Yakima River and its tributaries; and in further compliance with the said act did file a certificate of the feasibility of the Yakima Reclamation Project on April 18, 1906. A supplemental notice of the withdrawal of the then unappropriated waters of the Yakima River on April 23, 1906. A certificate of the feasibility of the Yakima project supplementary to the foregoing named certificate on December 17, 1906; that on December 17, 1909, the Commissioner of Public Lands of the State of Washington pursuant to the aforesaid act granted an extension of the time of withdrawal of the waters of the Yakima River as aforesaid to February 20, 1913, that acting as aforesaid the said Commissioner of Public Lands on February 19, 1913, extended the said period of withdrawal to January 1, 1914, and that on December 22, 1913, the said commissioner extended the period aforesaid to January 1, 1916.

That the Secretary of the Interior, replying to Congressman W. L. Jones, declined by letter of

December 12, 1906, offered as Plaintiff's Exhibit "1," to adopt the said congressman's suggestion that the Yakima project be approved and certain requirements in advance of such approval be waived by the Secretary of the Interior.

[4] That on December 12, 1905, the Secretary of the Interior notified the director of the Geological Survey then in charge of the work of the Reclamation Service, laying down prerequisites identical with those above outlined, set forth in Plaintiff's Exhibit "1."

That there was then pending in this court a suit brought by the Prosser Falls Land & Power Company against the Washington Irrigation Company (which corporation subsequently and on June 23, 1906, conveyed to the United States its Sunnyside main canal) and against the agents of the United States in charge of the Yakima Indian Reservation in order to enjoin the defendants from diverting water to the prejudice of the said Prosser Falls Land & Power Company.

The owners of approximately fifty of the canals and ditches throughout Kittitas, Yakima and Benton counties, executed agreements relating to limiting the respective amounts of water claimed from the Yakima River by the respective parties, which instruments were in form identical with that attached as Plaintiff's Exhibit "A" to the original complaint in this action, except as to the amounts of water specified therein.

That copies of the limiting agreements aforesaid

were furnished to the Department of the Interior on March 15, 1906. Whereupon, on March 27, 1906, the Secretary expressly approved the Tieton and Sunnyside projects (being parts of the Yakima Project), and authorized the Director of the Geological Survey to proceed in the usual manner for the construction of the necessary works of the first sections of such project.

[5] That following the execution of said agreements of defendant and others and the dismissal of the litigations in this stipulation above referred to, the Secretary of the Interior has expended from the reclamation fund the following sums for building purposes; to and including May 31, 1913:

Tieton .....	\$2,492,000
Sunnyside ..	2,351,000
Pumping Lake Reservoir.....	516,000
Kachese Reservoir .....	510,000
Keechelus Reservoir .....	282,000
Cle Elum Reservoir.....	104,000
McAllister Meadows Reservoir..	12,000
Reconnaissance Hydrographic Investigation ....	17,000
Wapato .....	36,000
Kittitas ....	19,000
Benton ....	11,000

being a total for construction purposes of \$6,350,000. In addition thereto prior to May 31, 1913, there had been expended from the reclamation fund \$516,500 for operation and maintenance purposes.

That the expenditures aforesaid were made in point of time as follows:



Prior to June 30, 1906	66,000	From 5th Annual.
" " " " 1907	622,000	" 6th "
" " " " 1908	1,263,000	" 7th "
" " " " 1909	2,415,000	" 8th "
" " " " 1910	3,669,000	" 9th "
" " " " 1911	5,419,000	" 10th "
" " " " 1912	6,423,000	" 11th "
" " " " 1913	6,900,000	Estimated
" " " " 1914	7,420,000	"

That in pursuance of the act of the state legislature aforesaid Secretary of the Interior on March 8th, 1909, authorized the director of the Reclamation Service to "construct under the provisions of the Reclamation Act such works as may be necessary for the full utilization of the [6] waters so withdrawn (referring to the withdrawal made as aforesaid under the act of March 4, 1905), using therefor the funds now available under allotments already made, and the funds to be made available from time to time in the future in accordance with the regular procedure established for that purpose."

That on September 2d and 3d, 1890, notice of appropriation in accordance with law was posted and filed for record in the office of the auditor of Yakima County by the agents of the Northern Pacific, Yakima & Kittitas Irrigation Company to the amount of 2000 cu. ft. per second of time. Thereafter by the agents of the company an amended notice of appropriation dated March 23, 1891, was duly made for 1000 cu. ft. per second of time. That thereafter by mesne conveyances the water appropriation so made, together with an appropriation initiated prior thereto by the Kennewick Ditch Company for 54 cu. ft. of water per

second of time passed to the Washington Irrigation Company.

That by deed dated June 23, 1906, the said Washington Irrigation Company conveyed both the said water rights to the plaintiff herein, said deed being recorded August 29, 1906, Vol. 47 of Deeds, at page 586, records of Yakima County.

That the said appropriation of 54 cubic feet per second on the part of the Kennewick Ditch Co. and that of the Washington Irrigation Co. for 1,000 cubic feet per second were, prior to the said transfer to the United States, consummated by beneficial use, the former water-right in the entirety and the latter to the extent of approximately [7] 650 cubic feet per second and by the irrigation of large bodies of irrigable land under canal of the Washington Irrigation Co. known as the Sunnyside Canal, appurtenant to approximately 40,000 acres of land.

That the United States in pursuance of the said deed of June 23, 1906, took the water-rights in question burdened by the express obligation to deliver water to the persons who had purchased from the predecessors of this plaintiff in the possession of the said Sunnyside main canal.

That as a part of the plan for settlement of the water-rights of the Yakima Valley as required by the Secretary of the Interior, it was by the said directory recommended that the water-right then proposed to be purchased from the said Washington Irrigation Co. should be limited from the appropriation of 1054 second-feet to 650 second-feet. That the said recommendation was adopted by letter to

the director of the Geological Survey dated March 27, 1906.

That following out the withdrawal of the waters aforesaid the United States has constructed irrigation systems for the beneficial use of water from 90,000 acres upon the Sunnyside unit and 34,500 acres upon the Tieton unit of the Yakima project and is engaged upon the construction of additional portions of the Sunnyside unit, which, when completed, will increase the area of said unit to 102,000 acres approximately. The United States has furthermore entered into a contract with the irrigation district known as the Kittitas Reclamation District and agreed upon certain conditions contained in said contract to furnish [8] water from the natural flow of the Yakima River from storage reservoirs constructed and to be constructed upon the headwaters of the Yakima River.

The total amount of land susceptible of being irrigated under the plan for the plaintiff's Yakima project will approximate 500,000 acres of land.

That the price of the aforesaid combined supply composed of both natural flow and stored water to the Kittitas Reclamation District was rendered less on account of the fact that the plaintiff conveyed water from the natural flow during the early irrigation, and prior to the low water period, thereby lessening the water required by the district from plaintiff's storage works. That thereby the price to the said district was reduced and the said project was rendered more economical and feasible.

That defendant has its point of diversion above



the points of diversion for the plaintiff's Sunnyside and Wapato canals.

That the water in the Yakima River at the time of the approval of the Yakima project as aforesaid and as early as 1903 was fully appropriated during the so-called low water season, which, in normal years, began on or about July 1 and extended to September 30 approximately in each year.

That defendant has diverted, is diverting and unless restrained by the Court will continue to divert water from the Yakima River in excess of 80 cubic feet per second.

That the plaintiff is able and plans to make use of the natural flow existing in the Yakima River during normal years, except during periods of exceptional and [9] brief high water subsequent in each year to May 1. That the amount of stored water which plaintiff is able to secure from its Bumping Lake and Kachees reservoirs already constructed, from its Keechelus reservoir now under construction and from its proposed Cle Elum and McAllister's Meadows reservoirs is 1,082,000 acre-feet from which an estimated annual draft of 1,000,000 acre-feet can be made, and in order to irrigate the aforesaid area of 500,000 acres the plaintiff plans to utilize from the natural flow of the Yakima river prior to July 1 in each year 1,000,000 acre-feet from the natural flow of the Yakima river and its tributaries.

Defendant reserves the right to except to any of the aforesaid admitted facts upon the ground of their immateriality or irrelevancy.



IT IS STIPULATED, that the papers annexed to the certificate of Mrs. Bean, acting clerk of the U. S. R. S., date October 3, 1913, be received in evidence and marked as Plaintiff's Exhibit "A," and returned and filed herewith.

Mr. BURR.—I would like to offer a map of the Defendant Company's canal line for the information of the Court, if you are willing to stipulate to its substantial accuracy.

Mr. GRAVES.—It may go in by agreement.

Map referred to offered and received in evidence, without objection, marked as Plaintiff's Exhibit "B" and returned and filed herewith.

**Testimony of C. K. Tiffany, for Plaintiff.**

[10] C. K. TIFFANY, produced as a witness for plaintiff, having been first duly cautioned and sworn, testified:

Q. (Mr. BURR.) Mr. Tiffany, will you state your experience in irrigation matters, very briefly?

A. I have been connected with the operation and the management of the Sunnyside Canal since 1901, in the capacities of engineer, superintendent of irrigation and project manager.

Q. Was part of that experience prior to the taking over of the Sunnyside project by the United States?

A. It was. I was employed by the Washington Irrigation Company from the years 1901 to 1906, inclusive.

Q. What work are you in charge of for the Government at the present time?

A. I am in charge of the operation and the management of the Sunnyside and Tieton canals.

(Testimony of C. K. Tiffany.)

Q. Are you an actual land owner, Mr. Tiffany, of irrigated lands?     A. I am.

Q. Ever do any irrigating yourself?

A. I have done some.

Mr. Tiffany, will you state the conditions as to the available supply of water in the Yakima River subsequent to 1903, say, at and in the neighborhood of the Sunnyside main canal.

A. In 1905 and 6 I remember particularly the Sunnyside Canal was diverting practically the entire flow of the Yakima River at that point.

Q. That was not during the entire irrigation season?

[11] A. That was during the time of low water flow.

Q. How would you figure low water flow, Mr. Tiffany?

A. That is variable. The period of low water flow is during the summer and the entire amount was being diverted only from probably four to six weeks during those two summers.

Q. Was the water being put to use that was being so diverted?

A. So far as the Sunnyside Canal is concerned it was all being put to use.

Q. Can you state conditions as to 1909 and 1910?

A. 1909 I am not familiar with. 1910 we diverted all the natural flow of the river and had to use some storage water.

Q. Do you mean that you had to use stored water in order to make up 650 feet, and that there was not

(Testimony of C. K. Tiffany.)

sufficient natural flow to give you from that source 650 feet, or that you merely had to use some storage in excess of 650 feet, obtaining that amount from the natural flow?

A. I don't believe I can answer that question.

Q. Were you ever able to obtain a full appropriation of a thousand second feet flow during low water season subsequent to 1905?      A. No, we were not.

Q. And how would you define your water season for the purpose of that answer you just gave?

A. The seasons when the natural flow in the river is not sufficient to meet the appropriations.

Q. That would be for a longer period than four or five weeks that you just referred to above?

[12] A. In some years it was for longer periods.

Q. What I am getting at, that low water season then which you would not be able to obtain 1054 second feet, would that persist longer than five or six weeks?

A. No. Most of the years, practically every year since 1910, that season has lasted from about the middle of July into September and sometimes into October.

Q. Now, when you say that the low water season is such that the Sunnyside Canal would not be able to obtain 650 feet from the natural flow of the stream, does that mean that other appropriators would be required to reduce their diversions in order to permit the Sunnyside Canal to obtain the 650 feet?

A. That is just what I mean.

Q. These other appropriators would be subsequent

(Testimony of C. K. Tiffany.)

to the rights of the Sunnyside Canal?

A. Yes.

Q. Now, Mr. Tiffany, will you outline briefly the plans of the United States or the Yakima project, merely touching upon various units in general terms; beginning with the Sunnyside unit what is the proposed area of that unit when it is completed?

A. The Sunnyside unit will bring under irrigation about 102,000 acres.

Q. How much for the Tieton?

A. The Tieton unit 34,000 acres.

Q. What is the proposed area of the Wapato unit?

A. The Wapato unit will cover approximately 120,000 acres.

Q. How far has the Wapato unit been developed, Mr. Tiffany? [13]

A. There are now being irrigated approximately 40,000 acres under the Wapato.

Q. Will you state what the present plans are for that unit? A. As to construction?

Q. Yes.

Mr. GRAVES.—What do you mean as to construction? Do you mean the construction plans, engineering plans?

Mr. BURR.—No. I refer to the status of the Wapato unit. Do you object to his testifying as to that orally?

Mr. GRAVES.—No objection to his testifying to anything he knows. See whether he knows. I don't know whether he knows anything about it or not.

Q. Is the plan for the Wapato unit that the



(Testimony of C. K. Tiffany.)

Reclamation Service shall do the construction work, Mr. Tiffany?

A. As I understand it, the plan is, that the Reclamation Service shall construct the necessary storage.

Q. How far has that plan been outlined, as far as you know? What is the status of those plans, Mr. Tiffany, if you know, in what form are they embodied?

A. They are embodied in the form of an Act of Congress.

Q. A bill you mean, don't you?

A. A bill before Congress, I should say.

Q. Is that bill introduced, if you know?

A. I understand that it has been introduced.

Q. Now, how much land does that bill purport to irrigate? A. 120,000 acres.

Q. Would that land be irrigated under any appropriations made by the United States Government under the Reclamation Act?

[14] A. It would be.

Q. That is the plan, is it?

A. That is the plan.

Q. Mr. Tiffany, does that 120,000 acres contemplate all the irrigable lands in reservation? In other words, are they any pumping units in addition to that?

A. That includes the pumping unit from the gravity supply of the Wapato Project.

Q. Now, Mr. Tiffany, with regard to the Benton

(Testimony of C. K. Tiffany.)

unit; how large an area would be proposed to be irrigated by that unit?

A. The Benton unit will cover approximately 90,000 acres.

Q. Do you regard that as feasible? A. I do.

Q. The High Line unit, Mr. Tiffany; what is the area approximately which would be proposed to be covered by that? A. 100,000 acres.

Q. So far as that has been developed do you regard that as feasible?

A. Well, I regard it as one of the most feasible projects.

Q. Mr. Tiffany, the supply that would be delivered to the Benton and the High Line units yet to be constructed as parts of the Yakima project, those possible to water, would be from what source?

A. It would be from the Yakima River, utilizing, so far as available, the natural flow, and supplementing that with storage waters from reservoirs at the head waters.

[15] Q. Would the feasibility of those projects be interfered with if the natural flow could not be delivered to them, but in lieu of natural flow the entire supply would be required to deliver from the storage reservoirs, or would they be feasible irrespective of that?

A. The full development of the project would be impossible without utilizing to the greatest possible extent the natural flow; that is, it would be necessary to cut out a large area that is supposed to be watered.

(Testimony of C. K. Tiffany.)

Cross-examination.

Q. (Mr. GRAVES.) What amount of land under the Sunnyside Irrigation Project would this 650 second-feet of water irrigate, what number of acres?

A. It would irrigate, when the land is fully developed, approximately 60,000 acres.

Q. In 1905 you did not have 40,000 acres in cultivation under the Sunnyside project, did you?

A. No, sir, not 40,000, I think.

Q. Didn't your report to the Reclamation Service in 1906 report that there was that year 40,000 acres? Just to refresh your recollection. In other words, what I want to get at is, in 1905, you had not much beneficial use of even your appropriation of 650 feet.

A. Yes, we had.

Q. Well, if you can irrigate 60,000 acres and you had only 40,000 acres under cultivation, you were not using the full amount of 650 second-feet to irrigate that 40,000 acres?

[16] A. To explain that I would simply say, that in 1905 a large part of that 40,000 acres had been very recently placed under cultivation, and it required temporarily—it was absolutely necessary for the development of the land—a larger amount of water.

Q. Well, you did not have 650 feet used in 1905, did you, during the whole water season?

A. 1905?

Q. That was the time that this suit was brought by the Prosser Falls people against the Washington Irrigation Company. There was not that much water flowing by Union Gap, was there, at that time?

(Testimony of C. K. Tiffany.)

A. There was more than that flowing by Union Gap.

Q. Have you consulted the gauge measurement taken by the Government at that time to refresh your recollection?

A. I have not for several days, but I have quite recently.

Q. The Wapato Unit that you speak of is upon the Yakima Indian Reservation?      A. Yes, sir.

Q. That does not come within the Reclamation Act whatsoever—you know that, of course—that is outside of the Reclamation Act, the watering of that land.      A. No, I do not know that.

Q. What bill do you refer to as in Congress? Do you refer to a bill introduced by Senator Jones that is pending, or do you refer to an item in the annual appropriation bill, or is all you know about it, Mr. Tiffany, just hearsay, what you have read in the newspapers?      A. I have read the Jones Bill.

[17] Q. You know that that bill has not passed the House, has it?      A. I am not posted as to that, no.

Q. It has not been reported from the committee, has it?      A. I couldn't say.

Q. It was introduced in the Senate and referred to the committee and has never been reported back from the committee. 120,000 acres in the Wapato project, you say. What you mean by the irrigation of that is this: The Indian Bureau is going to be authorized, or the plan is to authorize the Indian Bureau to build an irrigating canal system and the Reclamation Bureau is going to be authorized to



(Testimony of C. K. Tiffany.)

store water for use on the Yakima Indian Reservation—is not that the plan?

A. I believe that is the plan.

Q. And this construction of this canal and the construction for this stored water is to be charged up against the tribal fund, is not that the plan?

A. I believe part of it is to be charged against the tribal fund.

Q. And the whole cost of construction is to be charged against the tribal fund?

A. Of the distribution system.

Q. Yes. Well, if you are not clear on the items of the bill we will not go into it any further. I just wanted to see how far you had read it. The High Line, as you call it, there is no plan in prospect now to water those High Line lands?

A. There is a general plan for the development of the Yakima project, which includes that.

[18] Q. But the Government has not in view now, has not the intention now, of watering those lands, has it, anywhere in the future, has any definite plans? A. I think they have definite plans.

Q. You know that the Reclamation fund has not money enough to build that canal and store water for it, do you not?

A. I know that they have not at the present time.

Q. They have not any storage water for the Benton land, have they? A. Not at the present time.

Q. You know that so far as those high lands are concerned that an extensive survey was made covering those by the Northern Pacific Railway recently?

(Testimony of C. K. Tiffany.)

A. Yes.

Q. And they reported that project as not feasible under present conditions?      A. I do not know that.

Q. You do not know that?      A. No.

Q. Do you not know they turned over their plans to the Reclamation Bureau at Washington, gave them their plans, their surveys, and reported that they did not think it feasible to carry it out, but would lodge those plans with the Reclamation Bureau?      A. No, I do not know that.

Q. You know that the plan of watering the Kit-titas Reclamation District lands up there that you spoke of a moment ago is entirely dependent upon the sale of its bonds in order to procure the money to build canals, [19] and that there is no money for that purpose except by the sale of the bonds?

A. It depends upon some means of financing, of course.

Q. And you know that those bonds have been authorized for over two years now and no sales have been made yet?      A. I know that.

Q. You know that to be a fact?      A. Yes.

Q. You know that the Tieton project—how many acres out of the total Tieton project are you irrigating now?      A. We are irrigating 20,000 acres.

Q. How long has that unit been under operation?

A. Three years.

Q. You know that it is wholly problematical how soon you will bring the other area under cultivation, 14 or 15 thousand acres?

(Testimony of C. K. Tiffany.)

A. I know that the rate of development has been very rapid.

**Redirect Examination.**

Q. (Mr. BURR.) Mr. Tiffany, when the Sunnyside and Tieton projects were approved, in 1906, was the money for their completion entirely available?

A. It was not?

Q. The completion of those units was made by one allotment of Reclamation funds or by several?

A. It was made by several.

Q. Now, Mr. Tiffany, when the Sunnyside canal was about [20] to be taken over by the United States was the body of land which you have testified to as being 40,000 acres under cultivation, was that in a compact body or was that considerably scattered?

A. Largely scattered.

Q. What is the fact that irrigated lands so scattered tend towards the economic use of water or the reverse? A. The reverse.

(Witness excused.)

And thereupon a recess was taken until 1:00 o'clock the same day.

North Yakima, Washington, 1:00 P. M.,

July 1, 1914.

All present as at the morning session; continuation of taking of testimony as follows, to wit:

**Testimony of Frank Herke, for Plaintiff.**

FRANK HERKE, produced as a witness for the plaintiff, having been first duly cautioned and sworn, testified:

(Testimony of Frank Herke.)

Q. (Mr. BURR.) Mr. Herke, are you a user of water for irrigation purposes? A. I am.

Q. How long have you been a farmer?

A. I was born in Yakima County and I have farmed for 30 years—born here forty years ago.

Q. What ditch did you take your water from?

A. Out of the Piety Flat Ditch. Of course, we have been using—we began irrigating in 1881 or 1882; on the other ranch I am now there has been irrigation since '82.

Q. Where does the Piety Ditch take its water from the Yakima River?

A. About a mile below the Sunnyside Canal intake.

Q. Now, Mr. Herke, you have been farming on that place during all these years you have been a farmer?

A. We have farmed on that Parker Bottom place since 1891.

Q. When did you first take water through that Piety Ditch—that year? A. Yes, sir.

[21] FIRST DAY—AFTERNOON SESSION.

[22] Q. Your ranch was as early as any on the ditch, was it?

A. Yes, but our ranch was irrigated ten years prior to that time.

Q. Ten years prior to 1891?

A. Yes, nine or ten years prior to that.

Q. Now, Mr. Herke, have you been at any time short of water for your property? A. Yes.

Q. When did you first notice that shortage?

A. It was in 1900 or 1901.



(Testimony of Frank Herke.)

Q. And will you describe conditions at the time when the Sunnyside main canal and its water rights were purchased by the United States, that is, in 1905, will you describe conditions as to whether or not you got water enough at that time?

A. There was along in July that it commenced to work a hardship on us, from July 5th up to October—up to about the 1st of October when we quit irrigating.

Q. (Mr. GRAVES.) What year was that, Mr. Herke?     A. That was in 1905.

Q. (Mr. BURR.) And that shortage was such that you could not get all of the water that you thought you were entitled to at times?

A. When we had our little dam, a little dam—we would put in logs and wood, and put in big boards and manure until it was dammed—at times it would be about half a head of water, what we would like to have, and at other times a little freshet would come on, a little rain or something and then we would have quite a little head again for a few days, and it would work like that, [23] and the fish came up one particular time, it was August 27th, and when we shut off the water too much they just come up in streams, I was a kid at that time, and we just scooped them up in hatfuls. I was a little bit of a fellow then, we had to do that to save our hops and crops.

Q. Were conditions similar after that time?

A. Well, after 1905, 1906, 1906, 1907, 1908, 1909, 1910, some years they would vary and get a little better, but I measured the waters the best I could

(Testimony of Frank Herke.)

with a rule or a square and I don't think we ever got over from four to eight cubic feet per second of time past our intake or up to our intake, that is, for the years 1906, 1907, 1908, 1909, and up to the year 1913, I don't think it averaged over—that is, from July 18th until October the first, that it averaged over from four to ten cubic feet per second of time, at my intake during those years. That is up to 1914.

Q. Did your crops suffer occasionally from drought?

A. Yes. In 1905 and 1906 was the worst.

Cross-examination.

Q. (Mr. GRAVES.) This is a private ditch of yours?

A. Yes, sir, it is a private ditch.

Q. You do not take water from the United States Government in any way?

A. Well, no. I am signed up with the Government now because I knew it was up to me to enjoin every water user from here to the head of the river, and I was up [24] against the real thing, see?

Q. What time did you sign up with the Government? A. Lately.

Q. How long ago, how many years ago?

A. Last January.

Mr. BURR.—They are taking their water through the Sunnyside Ditch, now, Judge.

Q. You know that in 1905 the intake of your ditch was then below where the reservation ditch then came out? A. No. In 1905 it was above.

Q. Above your intake?

(Testimony of Frank Herke.)

A. In 1905 we was maintaining an outlet with the reservation ditch.

Q. In 1905?

A. We maintained the same outlet in 1905 and 1906, and in 1907 I went above—no, 1907 they went above me, and in 1908—well, I got it down at the books at home, you know. You know, I kept the books of that ditch company, I can tell you exactly to a scratch.

Q. What I wanted to get was the location of your canal with relation to the new reservation canal.

A. Yes.

Q. Was that below or above the intake of your ditch in 1905?

A. The old Gilbert Ditch, you mean?

Q. I don't know what it was called.

A. Well, the Toppenish-Gilbert Ditch.

Q. Then there was a new canal, you know, the big canal, taken out in 1903.

A. In 1903 by the Indians?

[25] Q. Yes.

A. It was taken out by the Indians; the first digging was done in 1904 on the Gilbert Ditch; that ditch is right in with our ditch; put them right in the same location; he took out a little in 1903 and then enlarged it in 1904.

Q. Now, is that below or above your intake?

A. Same place, it would be taking from the same place, both of them. We built the two intakes right close together, and if theirs was dry I was dry and if I was dry they was dry.

(Testimony of Frank Herke.)

Q. You spoke of a dam that you had there in the early days. Did you maintain a dam across the river?

A. Yes, sir. We hauled a few loads of manure and took all the waters of the Yakima River. That was in 1900 or 1901.

Q. Since 1905 have you had any increase in water over what you had in 1905 and 1906? In other words, in late years has it been better?

A. Yes, in a way, because when the storage—the Government turned the storages loose and it gave it that steady pressure and it kept the ditch and laterals full now, whilst the dam Douglas was sending to the headgates of the Washington Irrigation Company—in 1898, 1899 and 1900, whilst Douglas handled the headworks at the Sunnyside Canal intake we could not get any water and I got after him once or twice and then he let us have more water.

Q. Do you know what made the water so low in 1905?

A. Why, there was a dry season in the mountains. I know [26] I took a trip up in the mountains—

Q. Well, did you happen to know that the Cascades Canal Company up at Ellensburg commenced to take water in 1905?

A. No, I didn't know anything about that.

Q. You don't know anything about that?

A. No.

Q. Did you know anything about increased diversions along the Natches River? The Natches, of course, feeds in above your intake.



(Testimony of Frank Herke.)

A. The Selah canal may have been enlarged, I don't know what caused it.

Q. You don't know anything about what caused it?     A. No.

Q. You don't know whose diversion of water caused you to have a shortage down there?

A. Might have been natural drought in the mountains, I don't know what it was.

(Witness excused.)

Mr. BURR.—Plaintiff will offer in evidence this map.

Map referred to offered and received in evidence, without objection, and marked Plaintiff's Exhibit "C," and returned and filed herewith.

**Testimony of A. J. Splawn, for Plaintiff.**

[27] A. J. SPLAWN, produced as a witness for the plaintiff, having been first duly sworn, testified:

Q. (Mr. BURR.) Mr. Splawn, what is your official connection with the city of North Yakima?

A. Mayor.

Q. How long have you been in the Yakima Valley, Mr. Splawn?     A. About seventy-two years.

Q. Were you familiar with conditions about the time that the Yakima project was contemplated as a project under the Reclamation Act?

A. Fairly well, yes.

Q. Do you recall as to the conditions that were imposed by the Government as to the construction of the project in the valley?

A. Yes. I was interested in the settlement of the water rights of the valley and was on a committee

(Testimony of A. J. Splawn.)

appointed by the Commercial Club, I believe.

Q. Were you connected in any way with the activities of that committee?     A. Yes.

Q. In what way?

A. Why, spent almost all my time, day and night, in settling the water rights of the Yakima Valley. That is, the Government required an appropriation—at least as I understood it the Government required two hundred feet cut off of the different appropriations before they would come in here; that is, there seem to have been two hundred feet, two hundred cubic feet per second of time, appropriated, or claimed, more than the flow of the river at low water. So that had [28] to be adjusted, it had to go back to the Government, before they would take hold of any of the projects.

Mr. GRAVES.—I move to strike the answer for the reason that the Government's records show exactly the conditions which were imposed by the Government, through the Secretary of the Interior, and accepted by the water users of the Yakima Valley.

Q. Were the activities of the committee successful, Mr. Mayor?

A. Yes, sir, we succeeded admirably.

Q. And a contract entered into for that purpose?

A. Yes. Contracts were entered into.

Q. Do you recall whether a contract was entered into with the company that is the defendant in this case?

A. I understand this to be the West Side and Kittitas—

(Testimony of A. J. Splawn.)

Mr. GRAVES.—It is The West Side Irrigation Company.

A. (Continued.) No. I was not with the committee at that time. I was put on the committee after they had been up there. I was not one of the committee when that arrangement was made.

Q. Are you acquainted with the form of instrument, the execution of which was being advocated?

A. Well, I suppose I was, but at the same time it has been some time ago. I don't know that I could go to work and recall it. I would like to have it in so far as my work is concerned.

Mr. GRAVES.—We will stipulate, Mr. Burr, that exhibit "A" annexed to the Bill of Complaint, is the same contract forms signed by all of these canals and canal companies operating out of the Yakima River. The amount [29] of water specified they were, of course, different in each case.

Q. Do you recall whether The West Side Irrigation Company was one of the ditch companies with whom negotiations of this kind were carried on?

A. Yes, sir. I understood that to be the case.

Q. Do you know that of your own personal knowledge?

A. My personal knowledge, in that I have seen it and remember it. I do not know that I remember it all, but it was put down as different ones we could contract with. I kept track of them, generally carried most of them with me, and I remember seeing that agreement made, but I don't know that I ever read that contract.

(Testimony of A. J. Splawn.)

Q. That agreement was part of this program?

A. Part of the program.

Q. On the part of the committee?

A. That is my understanding, yes.

Q. May I ask the amounts that were specified in those agreements, the amounts of water, were they to be measured at the intake of these ditches from the river or to be measured at various points down each respective ditch.

Mr. GRAVES.—That is objected to as being immaterial as to any other contract except this contract, and at the making of this contract the witness has stated that he was not present and has no knowledge of its execution. Upon the further ground that the contract itself contains a statement as to how this water is to be measured.

A. Why, in all the contracts that I knew anything about or [30] had any connection with it was the understanding that it was at the intake, that that was to be diverted—I think it was from the intake.

Cross-examination.

Q. (Mr. GRAVES.) Your connection with this matter was this, as I understand you: you and other property owners in the Yakima Valley were desirous of having the Reclamation project, the Yakima project, undertaken; you understood that the Secretary of the Interior had imposed certain terms, and your committee was engaged in getting these different canal companies to sign this agreement. Was that it? A. Yes.



(Testimony of A. J. Splawn.)

Q. You yourself had no negotiations with The West Side Irrigation Company's officers?

A. No.

(Witness excused.)

**Testimony of Paul Taylor, for Plaintiff.**

[31] PAUL TAYLOR, produced as a witness for the plaintiff, having been first duly cautioned and sworn, testified:

Q. (Mr. BURR.) Mr. Taylor, what is your connection with the Yakima United States Reclamation Project?

A. I am a junior engineer, working under the instruction of the supervising engineer, with headquarters at North Yakima.

Q. What is the nature of your work?

A. Securing typographic data in connection with the stream and canal flow in the Yakima Valley and the study of the same for the ultimate development of the valley and for the use and regulation and operation of stored water.

Q. Mr. Taylor, how much land is under cultivation in the Sunnyside Unit?

A. There is this year 65,000 acres.

**Cross-examination.**

Q. (Mr. GRAVES.) How long have you been connected with the service under this project, Mr. Taylor?

A. Since the 28th of May, 1910.

Q. Do you recall from your records how many acres were under cultivation in 1905?

(Testimony of Paul Taylor.)

A. No, sir, I do not.

Q. Do you know how many were under cultivation in 1906?

A. No, sir, not without looking up those records.

Q. Assuming there were approximately forty thousand acres under irrigation in 1907, from that time down to 1910 there has been an increased area every year put in, has there not?

[32] A. Yes, sir.

Q. Every year there has been an increase?

A. Well, so far as I know there has. There has every year since I have been connected with the Reclamation Service.

Q. Now, in 1910, about what was the area in cultivation?

A. Well, sir, I don't remember without looking that up. I would want to refresh my memory before answering the question.

Q. Could you give me an idea of what percentage of increase there has been each year since you have been connected with the project?

A. In 1910 it is my impression there were between sixty and seventy thousand acres.

Q. And since that time you have increased it a number of thousand of acres each year until you have got up to your present 65,000?      A. Yes, sir.

Q. That is the area under cultivation in 1914?

A. That is this year.

Q. What has been the increase this year over last year, would you say? Any material increase?

A. Now, if my memory serves me right, we irri-

(Testimony of Paul Taylor.)

gated last year 65,000 acres.

(Witness excused.)

Mr. BURR.—That is plaintiff's case.

PLAINTIFF RESTS.

[33] SECOND DAY—FORENOON SESSION.

Courthouse, Ellensburg, Washington, July 2, 1914.

All present as at preceding sessions; continuation of taking of testimony resumed as follows, to wit:

**Testimony of W. A. Stevens, for Defendants.**

W. A. STEVENS, produced as a witness for defendants, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Your name is W. A. Stevens? A. Yes, sir.

Q. Where do you live or reside at the present time?

A. My residence is in Long Beach, California, at the present time.

Q. How long have you been acquainted with the Kittitas Valley? A. Since 1873.

Q. Did you live in West Kittitas Valley since that time until you removed to Long Beach?

A. Yes, sir.

Q. About what time was it you went to Long Beach?

A. Well, that was 1910, December, 1910.

Q. Were you the owner of lands in the West Kittitas Valley? A. Yes, sir.

Q. Were you connected with the defendant, The West Side Irrigating Company, in any way?

A. Yes, sir.

(Testimony of W. A. Stevens.)

Q. From its organization on down to the present time?     A. Yes, sir.

[34] Q. You have been a stockholder and sometimes director?     A. Yes, sir.

Q. By West Kittitas Valley I assume you mean that portion of the Kittitas Valley that lies west of the Yakima river?     A. Yes, sir.

Q. There are two small streams that irrigate some land in West Kittitas Valley, the Taneum and the Manashtash?     A. Yes, sir.

Q. Those waters are used by the lands above The West Side Irrigating Company's canal?

A. Yes, sir, all of it practically. I believe all of it is used.

Q. And I believe you have knowledge that the waters of those streams have been decreed to those lands by a decree of the Superior Court of Kittitas County?     A. Yes, sir.

Q. When, as near as you can recollect, was The West Side Irrigation Company formed?

A. In June, 1889.

Mr. GRAVES.—I have here certified copies of the original articles of incorporation, which I desire to introduce in evidence as Defendant's Exhibit "1."

Articles of Incorporation referred to offered and received in evidence, without objection, and marked Defendant's Exhibit "1," and returned and filed herewith.

Q. Mr. Stevens, who were the original incorporators? I do not mean their names, but who were



(Testimony of W. A. Stevens.)

they, what was their business and where did they live?

A. They were farmers living along the west side.

[35] Q. What was the purpose of forming this West Side Irrigation Company and taking of the canal from the Yakima?

A. To irrigate our farms and for the handling of the water—distributing amongst ourselves.

Q. The incorporators were all farmers and land-owners on the west side? A. Yes, sir.

Q. I will show you a contract, dated the 5th day of June, 1889, and will ask you if that is the original of the contract executed by The West Side Irrigating Company *any* and Clinesmith & Clerf for the construction of the canal?

A. Yes, sir. I see my signature there.

Q. That is your signature as secretary?

A. As secretary, yes, sir.

Q. Were you secretary at that time?

A. Yes, sir.

Q. To refresh your recollection you looked over this a few minutes ago? A. Yes, sir.

Q. This states the dimensions of the canal as proposed? A. Yes, sir.

Mr. GRAVES.—I want to offer that in evidence as Defendant's Exhibit "2."

Mr. BURR.—What is the purpose of it?

Mr. GRAVES.—To show the size of the canal.

Mr. BURR.—That merely?

Mr. GRAVES.—Yes, that and to fix the date of the commencement of the work and to show the size and

(Testimony of W. A. Stevens.)

dimensions [36] of the canal.

Mr. BURR.—Is the capacity stated here?

Mr. GRAVES.—Yes, sir.

Mr. BURR.—What is the capacity fixed at?

Mr. GRAVES.—Sixteen feet, fourteen feet, twelve feet. I would like to have the privilege of substituting a certified copy for this original at some time.

Mr. BURR.—That is satisfactory.

Contract referred to offered and received in evidence, without objection, and marked as Defendant's Exhibit "2" and returned and filed herewith.

Q. Mr. Stevens, did these contractors commence work under this contract for the construction of the canal in 1889? A. Yes, sir, almost immediately.

Q. Where was it that you planned the construction of a canal of these dimensions? I mean with reference to any intent which the corporators had as to irrigating lands.

A. Well, you mean now as to the size of the canal?

Q. The size of the canal. In other words, did you have in mind the intention then to irrigate all the land on the west side that came under the canal?

A. All land under the canal, yes, sir, and of course we were just farmers, didn't know just what we did want. We thought we would like to make the canal large enough to carry our appropriations that we thought necessary to irrigate the lands under the proposed canal.

Q. I will ask you right here to state how many acres of [37] land there are now under the canal under irrigation.

(Testimony of W. A. Stevens.)

A. There are something like 8,000 acres of land under the canal.

Q. I will ask you to state, in a general way, Mr. Stevens, but in a comprehensive way, what you farmers did from the time you formed this corporation, both as to the amount of work you did, what means you had and how you worked this plan out that you inaugurated in 1889.

A. Well, of course it was a long time ago, 25 years, but I will do the best I can at it. To go back a year prior—I would like to bring that in—we organized what was called The West Side Irrigation Company, to be taken out higher up. That, I think, was for \$15,000, and we worked hard to get that stock subscribed, but we found we could not get sufficient to start it; then the following year, 1889, we saw that we must have water; we was having lots of trouble and some of them was going to begin suit and they said if we would make an effort to get water out of the river, why, they would not bring the suit. So we decided then that we would organize and start at the mouth of the Taneum—

Q. By the mouth of the Taneum you mean where the Taneum empties into the Yakima River?

A. Yes sir, that is where we were to start. And we would endeavor to raise ten thousand dollars, which we did, and started to work. Well, there was no way of condemning land at that time to obtain right of way, and consequently we had to pay very high prices and by the time we got the right of way half of our money was [38] gone, ten thousand

(Testimony of W. A. Stevens.)

dollars; we paid five thousand dollars for a right of way. Well, we had to keep the work going, because this contract, I believe, will show that it was for about eleven hundred dollars per mile, which would take up all of our ten thousand dollars and more, too—eleven hundred dollars a mile for twelve miles. Well, we had to have money; so we went to Mr. Kauffman, who is cashier, I believe, of the Ellensburg Bank—

Q. Of the Ellensburg National Bank?

A. Ellensburg National Bank. And he said he thought he could get us the money if enough of us would sign the note. So I think there was about nine of us signed the note for seven thousand dollars; that we thought would cover the expense. Of course there was the expense for an engineer and flumes and bridges came outside of this contract price of eleven hundred dollars a mile. So we borrowed that seven thousand dollars and spent all of that, and the contractors, I believe, was broke and finally threw up the contract, and we went on then and worked as best we could; sometimes we got men to work for stock; we tried to assess the stockholders for so much and found that the laws would not permit that—we could not assess them; then these parties wanted their money; we mortgaged it for, I forget the amount, to take up this note; then it ran along and we had no means of raising any money and the mortgage was foreclosed. There were a number of them that would not pay up under the circumstances. The mortgage was foreclosed and I think it was Mr. [39]



(Testimony of W. A. Stevens.)

J. C. Lloyd that purchased it, that is my recollection of it, and then something had to be done. There would be a new company organized to buy the ditch again, I think that was the plan, and they all came in then and paid up their shares, amounting to some thirteen dollars a share, I think, and we got on our feet again. Well, of course, by this time we had completed the ditch in a way. Now I can't remember the number of years that went on, but finally I think they agreed to an assessment of something like fifteen dollars per share and we let our contract then to Mr. Coleman, Sharp and Bradshaw.

Q. You increased your capital stock to \$30,000, did you not, also, during these years?

A. We did, yes, shortly after this we increased that.

Q. We are talking about the years now from '89 on up to 1900? A. Yes.

Q. I want to interpose a question right here. What have you to say as to the condition, financial condition, of affairs in the Kittitas Valley during the years from '89 along to '98 and '99?

A. Well, you take it up to—they were terrible hard times, it just looked like we would go broke—some of us did go broke, some of them lost their farms entirely on getting this ditch stock; wheat went down to twenty-two cents a bushel delivered at the mill, and hay and all the farm products in proportion, so that it made it an awful uphill piece of work to do anything.

Mr. BURR.—I object to so long a record. I

(Testimony of W. A. Stevens.)

think a good [40] deal of this is not relevant.

Mr. GRAVES.—Not entirely, perhaps, and I will try to shorten it.

Q. During all of these years, however, what was the fact as to the using of this ditch and the increasing of the area of cultivation?

A. Oh, they increased as fast as they were able to get water to irrigate with and run the ditch and kept increasing it.

Q. Now, Mr. Stevens, when Clinesmith & Clerf completed their contract as far as they went with it was there anything done about turning water into the head of the ditch, head of the canal?

A. Yes, sir.

Q. How much water was turned in there?

A. Ten thousand inches.

Q. Has the head of that ditch, the original diverting intake, has that ever been changed?

A. From the old intake to the present headgate I think there has never been any change made.

Q. That is, its dimensions are the same?

A. Its dimensions are the same.

Q. What have you to say with your knowledge of all these transactions whether or not The West Side Irrigating Company continuously and diligently increased its diversions and use of water upon the lands in West Kittitas Valley?

Mr. BURR.—I object to that as calling for a conclusion.

Mr. GRAVES.—To a certain extent it does, but you wanted it abbreviated, and I am trying to ac-

(Testimony of W. A. Stevens.)

commodate you as [41] much as possible.

A. You mean did they go ahead?

Q. Did they go ahead diligently?

A. Yes, sir, they did, to the very best of their ability, right along.

Q. Do you happen to know whether at that time the so-called Sunnyside Canal, which the United States has now, whether that suspended work and went into the hands of a receiver?

A. I heard of it, I didn't know anything about it.

Q. Mr. Stevens, what interest has a stockholder got in this canal? What does his share of stock represent in your corporation?

A. At the present time a share of stock represents an inch of water, is my recollection.

Q. What I want to know is, is there anything in your method of doing business or your by-laws which makes The West Side Irrigating Company a profit-sharing institution?

A. Oh, the company has no profits.

Q. That is what I want you to state. What does the stock represent—what is the stock for?

A. Well, of course we paid so much money for it and we got an inch of water, I think, at the present time.

Q. These shares of stock represent water?

A. These shares of stock represent water, yes, sir.

Q. The water is distributed to the shareholders in proportion to the shares of stock which they hold?

A. Yes, sir, and he is assessed for maintenance and running expenses on that.

(Testimony of W. A. Stevens.)

[42] Q. And you assess the shares of stock for maintenance? A. Yes, sir.

Q. Does the canal company itself own any stock or own any water?

A. Oh, no, I think not.

Q. What is it as related to its stockholders?

A. It is simply a managing affair, I would call it. That is, it is organized for the distributing of water, and taking care of the canal and managing it, I would say.

Q. You have an acquaintance with such companies as the Manashtash Ditch Company and others?

A. Yes, sir.

Q. You use them simply as distributing agencies?

A. Yes, sir.

Q. For the shareholders? A. Yes, sir.

Q. What we sometimes term mutual water companies?

A. Yes, sir. As we used to say, we were putting ourselves in shape to sue and be sued.

Q. And it seems you met with success in this particular case? A. Yes, we got sued.

Q. Did you maintain at the head of your canal any measuring device or arrangement?

A. No, sir.

Q. What was your method of ascertaining the amount of water being carried? Where was it measured, if at all?

A. Measured out to each individual stockholder; that is, a measuring-box or draw-box, as we called it.

[43] Q. So you never had any device by which



(Testimony of W. A. Stevens.)

you could determine how much loss there was by seepage?     A. No, sir.

Q. You carried the water and diverted the water to the extent of the carrying capacity of your canal and then measured it out to the water users?

A. Yes, sir.

Q. Are you skilled sufficiently in measuring-boxes to describe to us the pressure you were using?

A. No, sir, I am not.

Q. Bt the box which Mr. Anderson went out and examined, those were the devices that you used?

A. Yes, sir.

Q. The unit of measurement that you used was the inches measurement?

A. The same as was used on the Manashtash.

Q. Did you or your company ever deal in water according to the second foot basis?     A. No, sir.

Q. What was the term you always used relative to water?     A. Inches—miner's inches, I think.

Q. Miner's inches?     A. Miner's inches, yes, sir.

Q. And then you adopted a box and whatever that measured you called that inches?

A. Called that inches, yes, sir. That is all we knew.

Q. I will ask you this question: From your knowledge and long acquaintance there on the West Side and knowledge of the conditions is the amount of 4,000 inches, according to the measure of inches which you use, a [44] needed amount when measured out through the measuring-box taken out of the canal a necessary amount for the proper irrigation

(Testimony of W. A. Stevens.)

of this land lying under the canal?

A. I doubt very much if it is sufficient amount to irrigate all of the lands when put under cultivation.

Q. You doubt that it is sufficient? Then *you* answer would be that the full amount of 4,000 inches measured at that place and in that manner is necessary?

A. You mean through our measuring-boxes?

Q. Yes.      A. Oh, yes, sir.

Cross-examination.

Q. (Mr. BURR.) Now, Mr. Stevens, did the West Side Irrigating Company or the Kittitas enterprise under its first organization, did that ever develop so as to deliver any water?

Q. You mean The West Side Irrigating Company?

Q. Yes, the original incorporation.

A. Oh, no, sir. We never did succeed in doing it.

Q. I noticed in some of the old maps there is referred to a West Kittitas Ditch. Wasn't that another name for your ditch? I simply want to get it in the record.

A. No, that was simply a name for the organization, the corporation. We organized and I think perhaps filed papers, but failed to get the amount of \$15,000.

Q. What I refer to is this: there are on some of the old maps references to the West Kittitas Ditch as constructed as a diverting and irrigating ditch. I take it that [45] is your West Side Ditch, is it not?

(Testimony of W. A. Stevens.)

A. No, sir. If there is any reference to the construction or anything of that kind, it could not be, because there was nothing of that kind. It was simply an organization which never did anything except to make some surveys. We did that and spent the money we raised.

Mr. GRAVES.—There is no other canal over there of that name except the West Side Irrigating Company's canal.

Mr. BURR.—Can we stipulate with reference to the references on the map, that those references to the West Kittitas Ditch refer to the West Side Canal?

Mr. GRAVES.—I think that is a fact.

The WITNESS.—After that they got the names mixed, you know. Once in awhile it would be called the West Kittitas Ditch instead of The West Side, they called it in that way.

Q. Now, Mr. Stevens, this reference to 10,000 inches; are you definite as to that figure, as to that capacity?

A. That is what our engineer and one of the trustees turned through.

Q. Who was the engineer?      A. Mr. Mason.

Q. He told you there was a capacity there of ten thousand inches in the first mile?

A. Yes, sir. That was the report of the president and myself, I believe, and I think the board, as near as I remember it.

Q. Is that report in writing?

(Testimony of W. A. Stevens.)

A. Well, it might be if we took down the old records of that time.

[46] Q. What date would that be, Mr. Stevens?

A. That I would think to be in spring of 1890. That part of the ditch was completed, I think, during the fall and summer.

Q. How long was that first section?

A. That section was 1300 feet, and there was a wasteway or spillway, you might call it—there was a wasteway at our second headgate, as we termed it; then there was a wasteway where the water would turn back into the river, but we could have about that much turned down the ditch, you see.

Q. How much land was there, approximately, in cultivation at that time?

A. Oh, I have no idea how much.

Q. Nothing like your present amount, of course? It takes time to irrigate land?

A. Oh no, nothing like the present amount. We could get that though, if you want it, from the assessor's Assessment-rolls.

Q. Now, between the period of '73 when you came into the country and '89 when this construction begun, were you irrigating, Mr. Stevens?

A. Yes sir, I had a farm.

Q. You were irrigating from one of these ditches?

A. Yes, sir, from the Monashtosh, the old Monashtosh ditch.

Q. And did you continue to use from that ditch after the organization of this company?

A. Not after got water from the west side; oh, no.



(Testimony of W. A. Stevens.)

Q. When did you begin to get water from The West Side [47] Ditch.

A. I think we got some in 1890, but in 1891 we had sufficient.

Q. Now, Mr. Stevens, the original incorporation was for how much capital stock?

A. That is, the first incorporation?

Q. Yes, sir. A. Ten thousand dollars.

Q. You are now talking about the first incorporation of the West Side?

A. The West Side Irrigating Company was for ten thousand dollars, yes, sir.

Q. That was divided into two hundred shares at fifty dollars each? A. Yes, sir.

Q. Now did those shares represent the acres or how did you divide your water?

A. Oh, I don't know what they did represent. We just wanted to raise so much money to start the work.

Q. Your shares now represent water, not profit in the organization?

A. They represent water now, the four thousand—

Q. When did you make that by-law?

A. Well, now I couldn't tell just the date, but my recollection is that it was—it must have been 1908—somewheres along there. I couldn't tell you because I don't remember the date.

Q. Will the books show that, Mr. Stevens?

A. Yes, sir. I think our records will show.

Q. The original intention was to have shares of stock represent [48] water or profit?

(Testimony of W. A. Stevens.)

A. Well, I couldn't tell you—no, there was no profit in it.

Q. It was intended as a profit-sharing institution?

A. Oh, no. It was simply to irrigate our farms.

Q. What is the present capacity of that ditch at its point of intake?

A. Well, it would be fully as much then at the start. At the intake—I don't know how much about that intake, just what it would carry. I planned it too, or helped plan it. I think it will carry ten thousand inches comfortably.

Q. Those original contractors never completed the ditch, did they?      A. No, sir.

Q. They completed a certain portion according to specifications, did they?

A. Oh, they completed it all along in places and they left other places uncompleted.

Q. The dimensions specified in that contract that you had with them, though, for the various sections in the twelve miles, that does not represent, does it, the actual construction during that period or for a long time afterwards?

A. What they constructed they constructed according to contract, that is what I mean. As to the dimensions of the ditch, they made them the required size, but there was a great many places they didn't put it to grade and there was cement gravel, what we termed cement gravel, that was struck and it was away up above [49] the grade.

Q. Now as a matter of fact they did not complete that below your spillway, did they?

(Testimony of W. A. Stevens.)

A. Sure they completed that below the spillway. I think the first two miles, perhaps the—I think the first six miles was completed.

Q. Can you positively state that it was completed for six miles according to the dimensions specified in the contract? Can you state that positively?

A. Let me think for a second now. Yes, sir, I think I am safe in saying that the first six miles were completed according to contract, or very nearly so. I am not positive as to where each station went; that is, what I mean to say, there was station one and station two comprising the first two miles—I think that you will find in the contract; then it was another two miles, but I don't know just where that ended; then there was another two miles which I know pretty nearly, which I can safely say was six miles of the ditch which I am pretty sure was completed, that six miles.

Q. By those contractors?

A. By those contractors, yes, sir. It was in the fourth station.

Redirect Examination.

Q. (Mr. GRAVES.) Mr. Stevens, taking the section of that canal from the point where it leaves the river and follow it down during its course, say of two to four miles, where is the drainage of that canal; in other words, [50] any loss from drainage, where does that go, if you know? What is the slope?

A. You mean the loss from drainage?

Q. Yes, from the canal.

(Testimony of W. A. Stevens.)

A. Oh, that goes right back into the river.

Q. Part way along the hillside there you are very near the river?      A. Yes, sir.

Q. And there is no rise of ground or anything to divert any drainage water from the river?

A. Quite a distance there, there is a kind of slough; there was our greatest loss, and it runs right back into the river there, I would say, a quarter of a mile—drops right into a kind of slough, I would call it.

(Witness excused.)

**Testimony of E. I. Anderson, for Defendant.**

E. I. ANDERSON, produced as a witness for the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Where do you reside, Mr. Anderson?      A. Tacoma.

[51] Q. What is your profession?

A. Civil engineer.

Q. How long have you been engaged in the practice of your profession, approximately?

A. Upwards of twenty-five to twenty-seven years.

Q. Did you ever reside in the Kittitas Valley, in the City of Ellensburg?      A. Yes, sir.

Q. How many years were you here, approximately?

A. I resided in Ellensburg from 1888 until 1901 and from 1905 until 1908.

Q. When you left Ellensburg in 1901 you became an engineer in charge for the State Land Commis-



(Testimony of E. I. Anderson.)

sioner's Office?     A. Yes, sir.

Q. Did you have a knowledge during all the time that you lived in Ellensburg, in a general way, of the West Kittitas Valley?

A. Yes, sir. I have been acquainted with that section of country since I came here.

Q. Did you ever make any examination of the Canal for The West Side Irrigating Company during the present year or just prior to the beginning of this suit?     A. Yes, sir.

Q. In your capacity as an engineer you were employed for that purpose?     A. Yes, sir.

Q. What years, Mr. Anderson?

A. I was engaged by the company during the year 1912 concerning matters relative to the pendency of this present litigation.

[52] Q. I show you a blue-print map and ask you under whose direction that was prepared?

A. That was prepared by myself to accompany a report of the results of my investigations for the company.

Q. Does this map correctly show the course of the Yakima River as marked upon it, the course of the West Side Irrigating Company's canal, and the area of country between the canal and the river, does it? It shows, in other words, approximately the location of the river and the ditch?

A. It was compiled from data filed here in the county offices. It does not represent a particular survey made by myself as to alignment, but it is compiled from data existing here in the county

(Testimony of E. I. Anderson.)

offices, showing the location of the ditch, the river and the lands.

Q. The question I asked you, the plan shows that to your knowledge correctly?

A. To the best of my knowledge it does.

Mr. GRAVES.—I would like to tender that as an exhibit in the case on our part.

Mr. BURR.—No objection.

Map referred to offered and received in evidence, without objection, and marked as Defendant's Exhibit "3" and returned and filed herewith.

Q. I wish you would describe, Mr. Anderson, as nearly as you can, the size and the dimensions of this canal as you know it now.

Mr. GARRECHT.—Objected to as immaterial as to what they were in 1912.

Mr. BURR.—He has not shown that he has any direct knowledge [53] or has examined the ditch. That is all taken from data selected by other persons, he is not qualified to answer that question.

Q. You went over the canal, Mr. Anderson, as I understand it?

A. My work in 1912, consisted largely in gaugings of the canal to determine the amount of water flowing through the canal, but it did not embrace an examination of all sections of the canal to determine its cross-sections; casings were at the various flumes along.

Q. Yes, but I want to know if you made investigation enough of it to state in general terms the size of the canal. Did you make any measurements

(Testimony of E. I. Anderson.)

there under this section or any examination of it?

A. I did. I made measurements at what is known as the Gordon flume on that canal, the Irwin flume and the flume immediately below known as the Ellison flume, which I am not certain is marked on that map, what is known as the Stevens flume and Monashtosh flume.

Q. Those are flumes which carry the water of the main canal?

A. Those are flumes which carry the water of the main canal over the depressions and canyons and so forth.

Q. I wish you would mark on this approximately where the Ellison flume is. It is not shown here, if you can give us some idea of where it is marked on the map, Defendant's Exhibit "3."

A. It is located at about the point on the canal line which I have indicated upon the map by a lead-pencil cross.

[54] Q. That is the Ellison flume?

A. Yes, sir.

Q. Have you, either from recollection or written data, any written data, information as to the dimensions of the Gordon flume, then coming down to those other flumes and give us those.

A. Yes, sir, I have a record.

Q. Can you give it from recollection?

A. I would rather refresh my memory by reference to my note-book.

Q. You may refer to it then.

A. I haven't it with me, it is down at the hotel.

(Testimony of E. I. Anderson.)

Q. Well, at this point which you gave me, have you that data?      A. I have a copy of the report.

Q. Is there anything stated there so that you can refer to that?

A. Not as to the dimensions of those connecting flumes. My recollection is that the Gordon flume is about fourteen feet in width—

Mr. GARRECHT.—Just make the record show that we object to this testimony as to what these ditches and flumes were in 1912 on the ground it is immaterial.

Mr. GRAVES.—I will pass that then until the witness can have an opportunity to consult his memorandum; state, Mr. Anderson, what you did there in 1912 with regard to gauging.

A. I gauged the water and measured the water flowing through the flumes I have heretofore mentioned. I took measurements of the canal for the purposes of determining [55] the flow of water in the canal and for the purpose of collecting data upon which the discharge curve might be established, that would enable the discharge of the canal at any given gauge height to be estimated.

Mr. BURR.—It is possible we can stipulate the amount of that flow through the ditch.

Q. Mr. Anderson, did you see the boxes there which were used by the water users and shareholders?      A. Yes, sir.

Q. Where the water was measured out of the canal?      A. Yes, sir, I did.

Q. What system of measurement did they have?



(Testimony of E. I. Anderson.)

Q. (Mr. GARRECHT.) That was in 1912?

A. Yes, sir.

Mr. GRAVES.—I have shown by the other witness it was a continuous system up to that time.

Q. (Mr. GRAVES.) Now you may answer my question, Mr. Anderson.

A. The system of measurement for the distribution of water by The West Side Irrigation Company is a measurement of a quantity of water through an orifice in the sides of the box. Their measurement is analogous to the methods that were used in the early days by the miners in California, miners measurement of water, and the unit of measurement among them is what is known as the inch of water.

Q. Well, what I want to get at is what their measurement was as to pressure and the like, so as to determine the flow.

A. The West Side Irrigation Company's module for the [56] measurement of water consisted of a box, entering one side of which an orifice has been cut, the width or depth of that orifice being about four inches; the bottom of the orifice being about three inches above the bottom of the box and the top of the orifice being five inches below the top of the box, making the total depth of the box twelve inches. In the operation of those for the distribution of water, they divert the water from the canal into what they term the draw-box, which is essentially a rectangular box, that is, in cross-section it is rectangular and extends in length sufficient to extend through the bank of the ditch, having a head

(Testimony of E. I. Anderson.)

in the main canal, and the amount of water that goes into the draw-box is regulated by just a sliding gate which works upwards. The function of that draw-box is simply to measure the amount of water to this measuring-box I have before described, and in the operation of this canal they admit an amount of water into this measuring-box until the water comes to the top of the box. The dimensions of the box vary according to the amount of the water that they have to discharge, those discharging a larger quantity being larger in size, cross-section, than those having a small quantity, the idea being to maintain the water at the top of this measuring-box in as quiet a condition as possible.

Q. Now converting inches into terms of cubic feet, how does their inch compare with the inch used by the United States Government in its measurement?

Mr. GARRECHT.—Before that question is answered we would [57] like to put in a general objection to the testimony to this effect: this testimony will not be relevant or material in our contention at all; it could not be relevant under the pleadings unless defendants first were entitled to show that there was a mistake at the time the agreement was entered into between the Government and The West Side Irrigation Company, and our contention is that under these pleadings the defendant company cannot question the terms of that written agreement because they are clearly stated in the agreement; there is no allegation of fraud and the terms are not ambiguous, but are clear. Now with that under-

(Testimony of E. I. Anderson.)

standing, that we can object to that class of testimony on those grounds, the witness may proceed.

Mr. GRAVES.—My purpose in doing this is that the agreement says 2d-foot and I want to know what that means.

Q. I will put it this way; take, say, four thousand inches as they have measured it, how many second-feet will that make?

Mr. BURR.—We object to this question because the witness has not shown the United States Government ever figured in inches.

Q. How many second-feet would four thousand inches measure under these farmers' way of measuring, what amount of inches converted into second-feet?

A. I don't know whether I can answer that off-hand or not. I think I can find it in the report here.

Q. Yes, refer to your report and find your figures.

A. The value of four thousand inches, as measured by the West Side Irrigation Company in the distribution of [58] water in the operation of their canal is the equivalent of 90.4 second-feet, according to the calibration of their boxes.

Q. Did you make any examination for the purpose of determining the loss in this canal by seepage?

A. Yes, sir, I did.

Q. Describe or state generally the sections of the canal where the seepage was the greatest and so on, commencing at the mouth and going down the canal.

Mr. BURR.—I object to that question. I do not think the seepage is material. If they are entitled



(Testimony of E. I. Anderson.)

to their water they are entitled to it irrespective of what seeps back into the river.

A. For the purpose of investigating the loss by seepage I divided the canal into five sections, the first section of which would be from the intake at the river to what is known as the Gordon flume, as marked upon the map (exhibit "3"); the second section would be from the Gordon flume to the Yearwood flume, as designated on the map; the third section would be from the Yearwood flume to the Stevens flume, as designated on the map; the fourth section would be from the Stevens flume to the Monashtosh flume, as designated on the map, and the fifth section would be from the Monashtosh flume to the lower end of the ditch.

Q. Give us the loss, tying down to those respective sections.

Mr. GARRECHT.—It is understood, Mr. Graves, that we do not have to repeat our objections each time?

Mr. GRAVES.—Certainly.

[59] A. I am at somewhat of a loss as to how to answer that question for this exhibit of the losses that I have here is based upon a number of different measurements and then I have an average of those, and as to what you desire in that respect—

Q. Well, what I want is an approximate estimate from your measurements there and your computations and your examinations, and your best judgment as to your results; your results is what I want. For instance; haven't you a measurement showing



(Testimony of E. I. Anderson.)

how much water was coming into the head of the canal and then what the loss was in that section under your general average? Of course it varies day by day according to the amount taken in, but your general average?

A. From the results that were taken there covering a period of five days of observation, between the Gordon flume and the Yearwood flume, the average loss in second-feet when the ditch was carrying between those two points an average amount of 69.7 second-feet was 2.6 second-feet, meaning a loss per square foot of area per day of 1.21 second-feet, or a loss per mile of two per cent.

Q. Now as to the next section.

A. From the Yearwood flume to the Stevens flume, an average of four days' observation of the canal when the average quantity carried by the canal was—average quantity is not stated in this, but for the four days, one of the days the quantity passing was 64.70. The next day the quantity passing was 64.40; the next day the quantity passing was 64.70, and the last day it was [60] 64.70; the average loss throughout those three days was three and a half second-feet in a length of canal of about five and a half miles, which means a loss per square of wetted area per day of .61 second-feet, or a loss per mile of nine-tenths of one per cent of the quantity carried.

Q. That section there was the least loss by seepage?

A. With the exception of one other it was the least.

Q. Go right along with the rest of it.

A. From the Stevens flume to the Monashtosh

(Testimony of E. I. Anderson.)

A. The records that I have been citing you are the results of the twelve observations in this canal. The results of the twelve observations show that in the manner in which they were distributing water in their canal, that in order to deliver four thousand inches of water at the head of the various laterals there it would require about 102—as the figures are here—102.1 second-feet to be diverted from the river to do that. The result of thirteen investigations carried along the same line gave a result of 104 second-feet to be taken from the river.

Q. Mr. Anderson, from your knowledge of the country there, the formation and so forth, where does this seepage water go to, where must it necessarily go?

A. It must find its way back into the river.

Q. In the Yakima River?

A. The Yakima River. No question about it.

Q. Referring now to the method of measurement; have you knowledge that the custom in the West Kittitas Valley, [63] outside of the use by The West Side Irrigating Company, of that unit of measurement being employed there—whether it is the custom of that section of the country to employ that unit of measurement?

Mr. BURR.—I object to that. The question of custom cannot be invoked where there is a contract specific of its terms as to the amount of water between the contracting parties. Custom is only proper in the absence of contract. That objection

(Testimony of E. I. Anderson.)

is in addition to the other objections we already have to this line of testimony.

A. The measurement of water, in using the inch as the unit of measurement and by modules for the measurement of that water, varying somewhat in character, is universal in the Kittitas Valley in the distribution of water along the flumes.

Q. Have you had an opportunity to examine and have you examined some of the decrees entered by the Superior Court of this County fixing these measurement units such as the Manashtash decree rendered in 1890?

Mr. BURR.—I object to that. The decree is the best evidence, and further, that a decree on another water right is not relevant to a water right on the Yakima. That objection is in addition to our other objections.

Mr. GRAVES.—I think I will let the question stand. I do not deem it material enough to introduce the Court's decree.

A. Yes, sir, I am familiar with the Manashtash decree.

Q. And the decree regarding the Taneum Creek, have you examined that?

[64] A. I have not.

Q. The Taneum Creek, where does it empty into the Yakima River with reference to the West Side Irrigating Company's canal?

A. It empties into the river a few hundred feet below their present intake.

Q. And speaking of this Manashtash decree, which

(Testimony of E. I. Anderson.)

is entitled Dray and Geddies against Johnson and others, that was the settlement of the rights with regard to the waters of Manashtash Creek?

A. Yes, sir.

Q. The one you referred to?      A. Yes, sir.

Q. Where is the Manashtash Creek with reference to this West Side Irrigating Company's canal?

A. The Manashtash Creek crosses, or rather the West Side canal crosses the Manashtash at a point, I should judge, about two-thirds of the distance down from throughout the length of the canal toward the lower end.

Mr. GRAVES.—I will want to recall Mr. Anderson after he has got his notes, but you can cross-examine him now upon this part of it, if you care to.

Cross-examination.

Q. (Mr. BURR.) Now, Mr. Anderson, Defendant's Answer in this case refers to enlargements of the West Side Irrigating Company's canal. There was an enlargement made in 1909, was there not, that you were engaged [65] upon?

A. No. My only connection with the work that was done in 1909 was I prepared the specifications in the office; another engineer had charge of the work; I prepared the specifications for the work, actually, I think, in 1907, and that was the work that went over until 1909.

Q. Who was that engineer?

A. Mr. Ellison was the engineer in charge of the work on the job.

Q. Mr. Ellison was the engineer on the job, was he?



(Testimony of E. I. Anderson.)

A. He was the engineer on the job.

Q. Did you prepare these plans for the headgate of the same size or larger?

A. I did not prepare the plans for the headgate. The only connection that I had with that was at the request of Mr. Stevens, I think, who was president or one of the trustees, that I prepare the plans and specifications for the letting of the contract on the excavation at the intake. I had nothing to do with making the designs or plans for the headworks there other than in that capacity at that time.

Q. How far did they move the headgate at that time, do you remember?

A. The old headgate was located—well, I think, directly answering your question, it was about a thousand feet.

Q. Up or down the stream?      A. Up stream.

Q. Just how much difference in elevation between the two points? Have you got the datum on those or either of them?

[66] A. I have not now. I can only give it to you approximately. I think the grade of that section of the ditch is about—my recollection of it is that it is five-hundredths to the hundred; that would make about a half a foot in a thousand feet; that is the grade of the ditch—I am speaking of the grade of the ditch from the intake down where it joins the head ditch. I may be mistaken about that, it is just simply my recollection of it.

Q. Well, how much difference in datum between the old intake and the new intake?

(Testimony of E. I. Anderson.)

A. I could not tell you, I don't remember.

Q. Well, how far along the river are those two points apart?

A. Not over a thousand feet, I think. Not farther than that, anyway.

Q. How long was the new canal which was constructed at that time from the river down to the old point upon the ditch where it joined the old constructed canal?

A. That was a thousand feet. That covered the first question that I intended to answer.

Q. Then the change along the river was a thousand feet and the change in the length of the canal was about a thousand feet?

A. They both ran parallel there.

Q. Now, Mr. Anderson, you say that seepage went right back off into the river. What is the average distance between the canal and the river? It can be gleaned from the map, but I would like to have it in the record.

A. Well, probably for the first quarter of a mile or fifteen [67] hundred feet from the intake the canal is very close to the river; it makes around an island there and the slough comes back into the river at the island, crossing just a short distance below.

Q. Is all that land between the canal and the river in cultivation at the upper end there?

A. The sections I am just now speaking of?

Q. Yes.

A. No, that is not. A portion of that is river land. I think there is a little island in there.

(Testimony of E. I. Anderson.)

Q. But I mean between the canal and the river say. There are trees there, are there not?

A. Not for the upper portion of it I have reference to.

Q. Now that seepage from there, does not that feed lots of vegetation, weeds and trees and growths of all sorts between there and the river? Is it not a fact there is all kinds of vegetation between the canal and the river, is there not?

A. At the section which we have under consideration at the present time, this slough is so near the canal that I do not think any extra vegetation would be caused by the seepage of water there. It would be naturally fed by reason of that slough running around so close to the canal. I do not think any extra vegetation is caused up there by *an* loss of seepage through this particular section we are referring to.

Q. But you do not mean to imply, Mr. Anderson, do you, that the water seeping under the soil will not be taken up by this vegetation as it passes?

A. No, I did not mean to imply any such thing as that. [68] What I want to imply is this, that such vegetation as there is there to take up this water would be there at any rate on account of the proximity of this slough, and whatever water was taken up, it would be a question whether it was taken up from the ditch or whether that seeps from this slough.

Q. There is vegetation all the way along, though, where the canal is much farther from the river than

(Testimony of E. I. Anderson.)

it is at the upper end, is there not?

A. Yes. There are places where the canal and the river are farther apart.

Q. The seepage water in that case will not run off into the river, will it? Will it not be taken up by vegetation in the meantime?

A. There will undoubtedly spring up certain vegetation that would consume a certain amount of water.

Q. Now, Mr. Anderson, the loss in a canal of .6 of one per cent of the amount it carries per mile—did I understand you correctly that .6 of one per cent is the loss per mile?

A. Yes.

Q. Is that very excessive?

A. Not at all.

Q. That is pretty conservative, is it?

A. .6 of one per cent a mile, that I only found in those sections of the ditch where there was the least loss by seepage, and the fact that the seepage there appears to be so light can be explained by the fact that in the lands immediately adjoining this ditch and above it through these sections are irrigated and that undoubtedly [69] the loss by seepage through those sections in there is recompensed by the loss of seepage from irrigated lands above, while at the upper and lower ends such conditions of affairs does not exist.

Q. Now, Mr. Anderson, in 1909 the enlargement we spoke of before, was not the ditch extended at its lower end very materially?

A. I am not conversant with the work that they did on the extension in 1909. My only connection



(Testimony of E. I. Anderson.)

with it, as I stated to you before, was the preparation of a certain set of specifications covering the contract at the head of the ditch. I was not in charge and was not employed by the company as an engineer in charge of that ditch at the time.

Q. Do you remember how many yards the excavation covered?

A. My remembrance is now that the contract was let on a unit basis, was to be paid for at so much per yard, which was to be returned by the engineer in charge, and that was a matter with which I had no connection.

(Witness excused.)

**Testimony of H. G. McNeal, for Defendant.**

[70] H. G. McNEAL, produced as a witness for the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Where do you live, Mr. McNeal?

A. Across the river on the west side, about three miles and a half from town.

Q. Are you a stockholder of The West Side Irrigating Company?      A. Yes, sir.

Q. Landowner under the canal?      A. Yes, sir.

Q. How long have you had a holding out there?

A. Since 1890.

Q. Since that time have you been acquainted with the canal?

A. Yes, sir, a greater part of the time.

Q. There was something said here about the extension being taken over by the company. Just

(Testimony of H. G. McNeal.)

state what the extension was.

A. That extension was built originally by the stockholders and later was taken over by the ditch company. There was stock owned below where the ditch company originally owned the land, there was lots of stock owned beyond that, and those stockholders maintained an extension to cover their land.

Q. Did they maintain it as a lateral?

A. Yes, sir, as a lateral.

Q. And they always used water through that extension?      A. Yes, sir.

Q. And then do you remember what time it was that the company took this over and maintained it?

[71] A. I could not tell you exactly; about 1905, I should judge. I am not positive, although I was one of the Directors at that time.

Q. It was done prior to the contract with the Government?      A. Long before, yes, sir.

Q. Now is there any flume in that canal now that was there at the time this canal was constructed?

A. There was three years ago. I have not been on the board since then.

Q. But up to three years ago there was?

A. Yes, sir.

Q. Where was that?

A. In Mrs. Ellison's field.

Q. This flume known as the Ellison flume?

A. Yes, sir. It is a box flume, about—I couldn't say, perhaps forty-five or forty-eight feet—I think three lengths, three sixteen foot lengths, I think, forty-eight feet.

(Testimony of H. G. McNeal.)

Q. And that flume three years ago was of the same capacity it was originally?

A. Yes, sir, never had been rebuilt.

Q. Do you know anything about the work that was done at the intake of this canal some few years ago—five or six years ago?

A. Yes, sir.

Q. I think it was in 1909.

Mr. BURR.—That is my recollection of it.

Q. If you know, state how that happened to be constructed there or repaired.

A. The river was digging away our old headgate, washing in [72] there and first we built a dam there so we could get water into our intake, and we put the dam on the wrong side of the river, consequently it forced the river away from us; then we seen what we were doing and we had to take and move the intake up the river to where it is now. The intake is substantially of solid rock, and the river never changes its channel.

Q. That was simply done then to repair the intake?

A. Yes, sir.

Q. Get a more permanent intake?

A. Yes, sir.

Q. Mr. McNeal, were you one of the trustees at the time this contract was entered into by which you agreed to take eighty second-feet of water?

A. Yes, sir.

Q. By whose authority did the President and Secretary sign that agreement?

A. I presume from the trustees.

Q. To refresh your recollection, was it not solely

(Testimony of H. G. McNeal.)

by resolution of the trustees and not of the stockholders?

A. Yes, sir. It was not by the stockholders.

Mr. GARRECHT.—We object to that. I think the minute-book would be the best evidence.

Mr. GRAVES.—All right; I will read it into the record. I have the Secretary here, but if you will admit this is their book I will just read it into the record that part of it. I do not want to put the book in evidence.

Mr. GARRECHT.—We want to object to this testimony on the grounds there is no allegation in the pleadings that the contract was not properly entered into, and all of this [73] line of evidence is an attempt by oral testimony to explain, modify, vary and enlarge the terms of a written agreement which is clear and unambiguous and which was executed and delivered by the defendant to the plaintiff. There is no allegation in the pleadings of any mutual mistake or that the contract was procured by the fraud of the Government.

Mr. GRAVES.—Do you want me to prove by the secretary that these are the minutes?

Mr. GARRECHT.—No. If you state those are the minutes that is all right.

Mr. GRAVES.—May I read this into the record instead of introducing the whole book?

Mr. GARRECHT.—That is all right.

Mr. GRAVES reads:

“Ellensburg, Washington, October 21, 1905.

Trustees Meeting at Kauffman & Frost's Office,



(Testimony of H. G. McNeal.)

all the Board being present except Sheldon and Mitchell Stevens. The following business was transacted:

The Secretary was notified at this meeting that on April 20, 1905 an extension was voted by the whole Board of Trustees and accepted as an extension of the main canal of The West Side Irrigating Company in accordance with a resolution of the stockholders at the annual meeting December 5, 1903.

Motion by W. A. Stevens, seconded by McNeal, that the President and Secretary be instructed to sign contract with Government accepting 80 cubic feet of water per second from April 1st to October 1st and [74] 34 cubic feet per second from October 1st to November 1st of each year as The West Side Irrigation Company's appropriation of waters of Yakima River, providing that the Government completed the Yakima River Irrigation Project. Carried.

J. O. Gibson was instructed to pay single men thirty cents per hour and men with teams fifty-five cents per hour for labor of unloading gravel and to charge twenty-five cents per meal or five dollars per week for board.

Motion duly made and seconded to draw orders as needed in favor of J. O. Gibson to defray expense of enlarging canal, in amount of fifty dollars each. Carried."

Q. (Mr. GRAVES.) I see, Mr. McNeal, that you were one of the parties who took part in this trus-

(Testimony of H. G. McNeal.)

tees meeting, seconded that motion. Do you know with whom you had had negotiations regarding entering into this contract before that time?

Mr. BURR.—We object to that. The negotiations were not part of the contract and the contract speaks for itself; the negotiations leading up to the execution of the contract are incompetent.

Q. Do you recall who it was, the gentlemen's name? To refresh your recollection, wasn't that an engineer by the name of Noble?

Mr. BURR.—I object to that as leading.

Mr. GRAVES.—I will supply it by another witness.

Q. Do you recall who it was?

[75] A. Yes, sir, I do now.

Q. Where did he interview the trustees, if you recall?

A. I could not say. It was either here in the courthouse or over at Kauffman and Frost's office, I couldn't say which.

Q. What was done with the contract after it was signed, do you recall now?

A. No, sir. I could not tell you that. The president or secretary looked after that.

Q. The president or secretary were attending to that? A. Yes, sir.

Q. Under what conditions was it, Mr. McNeal, that he stated to you and that you agreed to put in this 80 cubic feet—the term 80 cubic feet?

Mr. GARRECHT.—It is understood, Judge

(Testimony of H. G. McNeal.)

Graves, that this all goes in under our same objection?

Mr. GRAVES.—Under your same objection, yes. It will be considered as being made right straight through to all that line of testimony.

A. Well, my understanding was that the 80 cubic feet was the equivalent of four thousand inches of water, the equivalent of four thousand inches as we measured water.

Q. How was that?

A. The 80 cubic feet we were told by the Government engineer was the equivalent to four thousand inches of water as we measured water.

Q. How did you measure it?

A. The only place we measured it was at our various measuring places where we delivered water.

[76] Q. That is, as I understand you, by this term of 80 second-feet, or 80 cubic feet, you intended to limit your appropriation from the Yakima River to the actual amount of water that you had been using through your canal?

A. Yes, sir, not to exceed four thousand inches at the low stages of water.

Q. Did you or any of the trustees have technical knowledge that would enable you to convert the terms of inches into cubic feet or second-feet?

A. I remember the question came up there and I think it was Judge Kauffman—I remember asking him in particular ; I asked him if 80 cubic feet was equivalent to four thousand inches, that was our idea, and I asked him, and he said it was practically the same thing.

(Testimony of H. G. McNeal.)

Q. What I was getting at was, did any of the members of the board of trustees have any knowledge as to converting the term of four thousand inches into cubic feet?

A. I did not myself. I could not say as to the rest of them.

Q. You had nothing to do with the signing of this contract?

A. No, sir. Just the secretary and president signed it.

Cross-examination.

Q. (Mr. BURR.) Mr. McNeal, when did the stockholders build that extension that you spoke of?

A. When did we build it?

Q. Yes. You remember the first part of your testimony there about the extension. Were you under the extension?

[77] A. I was under the extension.

Q. Well, the extension that you spoke of, you are farther up, aren't you?

A. No, I am at the lower end of the ditch.

Q. Are you?

A. Yes. I was not at one time; I owned land originally, from '98 to 1903 or 1904, farther up on the ditch, but later on I bought at the lower end.

Q. And moved down there? A. Yes, sir.

Q. Now when you moved down there you put that land under cultivation that you got there, did you?

A. No, sir. That land has been under cultivation ever since I have been in the country.

Q. Now is not that under cultivation or under



(Testimony of H. G. McNeal.)

irrigation from some of these creeks?

A. No, sir.

Q. It was under this ditch, was it?

A. No, sir. Well, let me correct that; there is two ditches that run parallel; the upper ditch is a river ditch and the lower ditch is a creek ditch and they both cross each other and you can turn water from one to the other either way.

Q. That is true now, but was that true in 1905 when you moved over there? A. Yes, sir.

Q. Is not Mr. Fogarty a neighbor of yours?

A. Yes, sir.

Q. How much land does he irrigate?

A. I presume about two or three hundred acres.

[78] Q. How long has he been farming that land?

A. Well, more than twenty-four years, that is all I can tell.

Q. The whole of it?

A. Yes, sir, at least that much.

Q. Where does he get his water supply?

A. Out of the river, some of it; originally out of the West Side Ditch.

Q. Where does he get it now?

A. Out of the West Side Ditch, some of it, and some of it out of the river.

Q. How much does he get out of the West Side Ditch?

A. I couldn't tell you. The secretary could tell you how much stock he has, I couldn't tell you.

(Testimony of H. G. McNeal.)

Q. He gets out of the river where—out of his own private ditch?

A. What he gets out of the river comes out of his own private ditch, yes sir.

Q. When did he begin taking out of the river instead of taking his water from the West Side Irrigation Company's Ditch?

A. I couldn't tell you as to that.

Q. You have lived there twenty-four years, you say?

A. Well, but on some of it he can cover it from the West Side Irrigation Ditch and part he could cover from the river. But there is a man here that can tell you just exactly how much he can cover from the river and just exactly how much he can cover from the West Side ditch.

Q. Who is that?

[79] A. Johnny Morris, a neighbor of his.

Q. Now, Mr. McNeal, the intake which was built in 1909 after you found it necessary to move your place of getting your water from the river, was not that built a little larger than the old one?

A. I couldn't tell you as to that because I was on the board when that contract was let, and I think the year after, but not after the contract was completed. But the intake to the old ditch would carry more water than the new intake—it would the last time I was there.

Q. Is that statement made as the result of any measurements on your part?

A. No sir, just from observation.

(Testimony of H. G. McNeal.)

Q. And did you calculate the grades of the ditches at all?

A. The grades of the lower ditch, I think, was greater than the grade from the new ditch.

Q. They reached practically the same point, but the new ditch took up higher?           A. Yes, sir.

Q. The grade from the higher ditch was greater than the grade from the lower point, was it not?

A. No, sir. The water is confined more at our headgates now than it was before. Where our new intake is we take the water virtually out where the river empties into the canyon, right at the canyon and at the old intake is where the river was spreading out, and it is always changing. We spent several thousand dollars in putting in a dam there. For two years we [80] put in what we called a permanent dam, but it went out each year for two years, consequently we moved it. It was a very expensive piece of work.

Q. Now, Mr. McNeal, you spoke about this agreement being the act of the Trustees. The stockholders, however, never objected to this agreement?

A. I don't think the stockholders—as far as I knew we didn't know that the stockholders had any rights in it. We supposed it was up to the directors.

Q. Do you mean to say that you had a shareholders' meeting—you attended the shareholders' meetings, did you not?           A. Shareholders?

Q. Yes, the meetings of the shareholders or stockholders.           A. Annually I did, yes, sir.

Q. When they met there in their meetings they

(Testimony of H. G. McNeal.)

never protested once to that agreement, did they?

A. I don't know that was ever brought up, couldn't tell you that it was or was not, because Mr. Noble came up here and gave us the kind of lecture at that time and wanted us to receive less than 80 second-feet and we had felt that we needed more, but the Government agent said that any time we needed more the Government would give us more water and so forth and led us to believe we were to have all the water we wanted, that they was not trying to do us out of anything.

Q. What was the purpose of this contract from the Government standpoint?

A. Because the Government wanted to use more water some place else. That is the way they put it up to us.

Q. What was the reason for that instrument? What reason [81] was there for wanting that instrument signed?

A. Just the same as any other contract.

Q. Well, the Government was not contracting work in the Valley then, was it?

A. They were below.

Q. As a matter of fact the Yakima project had not been approved at that time, had it, Mr. McNeal?

A. Well, it hadn't been approved at that time, but they expected it to be approved at that time. It was surveyed and it passed—

Q. The resolution that was passed by the directors of the West Side Irrigation Company was under the conditions that it be approved, was it not?



(Testimony of H. G. McNeal.)

A. I couldn't tell you.

Q. The resolution that Judge Graves just read, "That the president and secretary be instructed to sign contracts with the Government to accept 80 cubic feet of water per second from April 1st to October 1st and 34 cubic feet from October 1st to November 1st of each year as the West Side Irrigation Company's appropriation of waters of the Yakima River, providing that the Government completes the Yakima River Irrigation project." A. Yes, sir.

Q. Now what was the purpose of such an instrument? Was it not in order to give the Government a definite and certain figure that they would be able to rely upon as your right in the appropriation of the waters of the Yakima River?

A. I presume it was.

Q. And when you signed that, you knew, did you not, that [82] that agreement would be the limitation of your right?

A. From what authority we could get then we supposed that your second-foot amounted to the same measurement that we were already using.

Q. And when you authorized your president and secretary to sign that agreement your engineer told you it was the same, you have testified?

A. Yes, sir, I believe I did. I didn't say the engineer; I didn't say the engineer told us that—well, Mr. Noble said he was an engineer.

Q. There was practically fifty inches to the second-foot—is that what you testified?

A. I believe so.

(Testimony of H. G. McNeal.)

Q. Well, is not that true?

A. I couldn't tell you whether it is true or not.

Q. The equivalent just given by the—

A. I am not an engineer, don't know anything about measuring water in second-feet at all.

Redirect Examination.

Q. (Mr. GRAVES.) I don't know whether you were present or not; Mr. Burr asked you if the stockholders ever objected; your meeting was on October 21, 1905; I see here that there was a special meeting of stockholders January 2, 1906, where it is moved and seconded that no action be taken to relinquish any water. Was that the time you referred to when the stockholders were objecting to your action?      A. I couldn't tell you.

[83] Q. You couldn't tell me?

A. No, sir, I couldn't answer that question.

(Witness excused.)

**Testimony of Mitchell Stevens, for Defendant.**

MITCHELL STEVENS, produced as a witness on behalf of the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Mr. Stevens, where do you reside?      A. On the west side of the river.

Q. How long have you resided there?

A. For over thirty years.

Q. Have you been acquainted with West Side Irrigating Company's affairs since its organization?

A. Yes, sir.

Q. Have you been a landholder under and a stockholder in that company?

(Testimony of Mitchell Stevens.)

A. I have been a stockholder since 1902.

Q. Since that time you have been acquainted with the business [84] affairs of the company?

A. Yes, sir.

Q. Mr. Stevens, you were a member of the board of trustees at the time this contract was made in 1905?

A. Yes, sir.

Q. Will you state pretty fully and in detail the circumstances leading up to the signing of this agreement with the United States?

Mr. GARRECHT.—That goes in under our objection.

A. Well, there was a movement on foot to have some understanding with regard to the amounts of water being used and of the size of the appropriations of these ditches, with the end in view, as I understand it, that the actual amounts appropriated should be determined, and that the Government would undertake a reservoir to build and so forth. That is the way I understood it.

Q. And who approached the company with those negotiations?

A. Well, the question was up, I think, two or three times, or a number of times. It has been quite awhile, but Mr. Noble did at one time—

Q. Do you remember Mr. Noble's initials?

A. T. A. Noble.

Q. Was he a member of the Reclamation Service at that time?

A. I understood him to be.

Q. He was a civil engineer?

A. Claimed to be, yes.

(Testimony of Mitchell Stevens.)

Q. Now, was he present about the time that you had this trustees' meeting, was he up here in Ellensburg?

[85] A. Well, Mr. Noble was up here at different times, but whether he was present at the trustees' meeting I would hardly undertake to say. I don't know whether he was or not.

Q. Now, then state on what basis the board of trustees was proceeding in signing this agreement. This agreement was signed—the secretary and president were authorized to sign this by the board of trustees? A. Yes, sir.

Q. Now, upon what were you proceeding when you put in there the term “eighty second feet,” and how you came to limit yourselves to that amount.

A. Well, we had been led to believe that 80 second-feet was equivalent to four thousand inches of water as we measured that water.

Q. And therefore instead of using the term four thousand inches you used the term eighty second-feet? A. Yes, sir.

Q. Under that construction to you?

A. Yes, sir.

Q. Would eighty second-feet, as you afterwards came to understand it, would that supply your needs and appropriation? A. No, sir.

Q. Was there any intention on your part or the part of anyone else to limit yourselves to any less water than you were entitled to?

Mr. BURR.—We object to the question as leading.

A. No, sir. We did not think we was giving away



(Testimony of Mitchell Stevens.)

any water. The stockholders had understood, or at least I [86] understood, I can only speak for myself, that we were entitled to four thousand inches of water from the river—that we were entitled to use four thousand inches of water measured out to us, as we understood water measurements. That was our idea of this matter. We had always, for years and years, had always understood we were to have four thousand inches of water, that that amount of water would be necessary to irrigate our land.

Q. Where were you measuring the water, at what point?

A. At our laterals, where they left the ditch.

Q. Had you any measuring box at the head of your canal?      A. No, sir.

Q. Had you any knowledge as to the amount of water that came in or means of measurement?

A. No, sir, we did not know how to measure it.

Q. Were you present when Mr. Anderson was testifying here, or had you come in at that time?

A. No, sir.

Q. Those measuring-boxes which Mr. Anderson observed and examined when he was there in 1912 and 1913, did they or did they not fix your unit of measurement—in other words, was that the way you were accustomed to measuring water?

A. Yes, sir. That is the only measurement we knew.

Q. You also have some land that cannot be irrigated from The West Side Irrigating Company's canal that you irrigate with water taken from the

(Testimony of Mitchell Stevens.)

Manashtash Ditch, do you not?      A. Yes, sir.

[87]    Q. How about the measurement fixed there, the custom of measuring there?

A. We use the same measuring-box on the Monashtosh that we had in the West Side Irrigating Ditch.

Q. And the Court fixed that in that Monashtosh case as the unit of measurement, did it not?

A. Yes, sir.

Q. You were a party in that case, I believe?

A. Yes, sir.

Q. State what the company did relative to its claim to this water after this agreement had been signed by the president and secretary; that is, was there any discovery made afterwards that the wrong method of measurement had been inserted in the contract?

A. Yes, sir. We afterwards, I can't just state the year it was probably—it might have been 1906 and might have been 1907, we were notified that we were running too much water—we were notified by Mr. Noble that we had to accede to the amount of water that we had been limited to and he left instructions to turn that water off. We found out that we would have less water than we were using and we refused to do it.

Q. Did you ever abandon the right to the use of these four thousand inches of water?

A. No, sir, we never did. A little while after that some of us went up to the head of the ditch and met Mr. Noble there. Mr. Noble protested that we

(Testimony of Mitchell Stevens.)

were using to exceed our amount of water, and we protested that we would not turn any water off; that we had to have that water as our appropriation, that that was our appropriation. [88]

Q. Did he make any statement to you regarding any stored water?

A. Yes, sir. He said that—seemed to realize that we were being pinched and he said he knew where we could get some stored water cheap.

Q. Then from that time up until the present time you have never abandoned the use of that water at all? A. No, sir.

Cross-examination.

Q. (Mr. BURR.) Mr. Stevens, you spoke of your appropriation, or of the company's appropriation.

A. Yes, sir.

Q. Did you ever file a written appropriation?

A. Not to my knowledge.

Q. Now it is a fact, is it not, that the stockholders when they met in their annual meetings never objected to the limiting agreement?

A. Well, the stockholders didn't suppose that they were taking a lesser amount than the appropriation. Some of them objected to any proposals at all along those lines—Mr. Coleman did, I remember that distinctly.

Q. Was that at a stockholders' meeting?

A. Yes, sir.

Q. Do you remember which year?

(Testimony of Mitchell Stevens.)

A. I would not like to be positive as to dates; I think it was 1905.

Q. This man did protest against that, did he?

[89] A. Yes, sir.

Q. Now, Mr. Stevens, do you recall whether or not you were a trustee in 1900?      A. No, sir.

Q. Were you a trustee at that time?

A. No, sir.

Q. You did not become a shareholder until 1903, I think you said?

A. It is 1902 or 1903, I could not be positive of the year.

Q. When did you become a trustee or an officer of the company?

A. Well, I think it was 1904, but I would not like to be positive without refreshing my memory. I can't remember exactly.

Q. Now, Mr. Stevens, in 1909 the stock of the incorporation was increased, was it not?

A. Yes, sir.

Q. How much had the capitalization been prior to that time? What was it at the time that increase was voted upon?

A. I think it was thirty thousand.

Q. Thirty thousand dollars?      A. Yes, sir.

Q. And how much was the par value per share?

A. The capitalized value was fifty dollars, but the actual value was far beyond that.

Q. Then you had how many shares, six hundred shares? Did that make it?

A. I think that was it.



(Testimony of Mitchell Stevens.)

[90] Q. Now it was testified this morning that a share represented an acre of water, was it not? You had four thousand shares; now it represented an inch of water, did it not, an inch of water per share and an inch to the acre?

A. Well, it didn't represent that. There is a lot more land than four thousand acres irrigated under the ditch. A share of water didn't represent an acre of land.

Q. What is your duty of water?

A. Why, in irrigating about seven thousand acres—

Q. No; how much do you deliver per acre, is it not an inch?

A. Well, in the neighborhood of an inch to the acre—in the four thousand inches.

Q. Well, how much do you deliver to an acre? You are a farmer, how much do you get? How many inches are you entitled to? How many shares have you?

A. I am entitled to the amount of water that my stock calls for.

Q. Well, what does your stock call for? How much stock do you own, Mr. Stevens?

A. I have 116 shares.

Q. How much land are you irrigating?

A. Well, other stockholders use part of that water part of the time. I am only using eighty shares for about a hundred and thirty acres.

Q. Now other men have a differing number of shares and the acreage that they own is not deter-

(Testimony of Mitchell Stevens.)

mined by the shares.      A. No, sir.

Q. I mean the number of acres they irrigate is entirely separate from the shares?

[91]      A. Yes, sir.

Q. Now one man might use two shares to the acre and other half a share to the acre?

A. That depends on the kind of land that he is irrigating. Some of it requires a half or three times as much as other acres do.

Q. When you increased from thirty thousand dollars how many shares did you have after the increase?      A. We had four thousand shares.

Q. You increased your number of shares from six hundred up to four thousand?      A. Yes, sir.

Q. Now where did that stock go, what became of that stock?

A. Oh, there was only twenty-three thousand dollars of new stock. It was figured out that we had—we aimed to capitalize the last time on the actual value and not the capitalized value of the stock. The actual value of the stock was not its speculative value, but the amount of money that we had expended on the ditch, was the way we got at it. We figured we had spent so much money on the ditch and then we used that as the measure of the capitalization. We figured, I believe, we had spent about \$57,000 on the ditch; then we decided to capitalize sufficiently to raise \$23,000 more money.

Q. Now where did you get that \$23,000, where did it come from?

A. Part of it was spent on the intake and part—

(Testimony of Mitchell Stevens.)

Q. No; not where it was spent; where did it come from— [92] selling shares?

A. Yes, the stockholders took the shares.

Q. And when they took shares were they entitled to water as a result of that? A. Yes, sir.

Q. How much water were they entitled to for each share?

A. We were supposed to run an inch to the share.

Q. But the old stockholders, they did not get any inch to the share? A. No, sir.

Q. That was a queer arrangement, was it not? The old stockholders did not get an inch to the share and the new stockholders did.

A. The size of that stock was different from the size of the old stock.

Q. The size of the new stock was not uniform, was it?

A. Yes, sir. The old stock under the old arrangement was five times the value of the new stock. We cut down the size of the share. The old stock called for one hundred dollars and the new stock calls for twenty dollars and the old stock was about five times the value of the new stock. The new stock had nothing to do—there was no relation between an inch to the acre on the new stock.

Q. But the old stock you declared an inch to the acre? Is that what you mean, that it was an inch to the acre of the old stock?

A. That was the idea.

Q. And a share was supposed to irrigate an acre, was it not?

(Testimony of Mitchell Stevens.)

[93]    A. No, sir.

Q. Irrigate an indefinite amount?      A. Yes, sir.

Q. Now who bought these twenty-three thousand shares or paid in the twenty-three thousand dollars? Do your record show that?

A. Well, I don't know whether the minutes do or not. The books would show it in some way. The treasurer's book ought to show it?

Q. (Mr. GARRECHT.) The stockholders knew about the contract you had entered into with the Government?

A. Well, a good many of them did.

Q. Well, didn't they all know it the following year, 1st of January, the following year, at the annual meeting?

A. I couldn't say that they did or did not.

Q. Was it not discussed?

A. Some of them have told me they did not.

Q. Well, was it not discussed at that meeting, at that meeting of the shareholders?

A. What was that date?

Q. The date of the meeting was January 2, 1906.

A. Well, I think it was.

Q. Was it not a minute made December 21, 1905, like this: It was regularly moved and seconded that a call meeting be held on January 2, 1906, to discuss the feasibility of entering into contract relations with the Government in the matter of the general agreement with the Government and other water users of the Yakima River. Was not that passed on the 21st day of December, 1905?



(Testimony of Mitchell Stevens.)

[94] A. I think it was.

Q. Then following that the meeting of January 2d, 1906, was a general meeting, was held and they did discuss it, did they not?

A. I think they did.

Q. So it was pretty generally known among the shareholders that you had entered into a contract with the Government?

A. Why, I think that the most of them knew it.

Redirect Examination.

Q. (Mr. GRAVES.) After the stockholders learned that you had entered into an agreement by which they had lost a large part of their appropriation did any of them ever assent to it, after they knew the facts?

A. Oh, no, no.

Q. I will ask you this in answer to the question of counsel; since the stockholders knew of the true status of affairs has any one of them ever assented to it?

A. Oh, no. Nobody wanted to give any water away.

Q. The contract, to refresh your recollection, shows here that it was moved that it be entered into by the president and secretary by the trustees, on December 21, 1905—is not this the fact; that on December 21, 1905, that this is the reading, I see that you were secretary pro tem and it is in your handwriting: "It was regularly moved and seconded that a called meeting be held on January 2, 1906, to dis-

(Testimony of Mitchell Stevens.)

cuss the feasibility of entering into contractual relationship with the [95] Government in the matter of the general agreement with the Government and the other water users of the Yakima River. After a general discussion, in which the sense of the meeting was found to be against any concessions of any water rights, motion carried unanimously." The motion carried unanimously to have a called meeting, was it not? That is the reading of this. And then on January 2, 1906—this is the entry—"Moved by W. A. Stevens and seconded by Goodman that no action be taken to relinquish any water at this time." If you don't recall this I want to read it into the record. You don't recall, as I understand, just what time it was that the stockholders discovered that you had signed this agreement, nor do you recall just what time it was that you know you had made a bargain to give away some of your water—you don't recall those dates, do you?

A. No, I don't recall the dates.

Q. But the fact—

Mr. BURR.—I object to so much leading.

Q. Well, I will ask you if it is not a fact that from the time it was discovered by the stockholders that the effect of this agreement, that they refused to ratify it?      A. Yes, sir.

Q. I will ask you this question: Did you not soon after that take legal advice as to what steps you should pursue?      A. Yes, sir.

Q. And have you acted on that legal advice since?  
[96]      A. Yes, sir.

(Testimony of Mitchell Stevens.)

Q. That has been a matter of knowledge to the stockholders generally, has it?

A. Yes, sir, common knowledge.

Q. That those steps were being taken?

A. Common knowledge.

Q. And neither the stockholders nor board of trustees since that time have taken any steps except under legal advice?      A. No, sir.

Q. (Mr. GARRECHT.) Was not that question of legal advice—Did not that come up on December 4, 1909?

A. Oh, no, it was long before that.

Q. (Mr. GRAVES.) I will ask you if when Mr. Noble was up there demanding that you buy stored water, or the like, if you did not call me up over the 'phone at Seattle?

A. Yes, sir, that same day.

Q. Long before any of these letters?

A. Yes, sir.

Mr. GARRECHT.—I want to offer the minutes of December 4, 1909, a resolution that was passed about employment of counsel.

Mr. GRAVES.—I have no objection to its going in the records, but I am going to prove something else if you put that in.

The WITNESS.—May I make a statement apropos of that?

Mr. GRAVES.—Yes.

The WITNESS.—The very first time that this water was attempted [97] to be turned off was the time when we decided to take legal advice, and

(Testimony of Mitchell Stevens.)

I called up Mr. Graves over the 'phone in Seattle and secured his services. I can't tell you just what date it was, I did not set it down.

Q. And later for the benefit of the stockholders and board of trustees you got a written opinion, did you not, from me and Mr. Gaby, or record?

A. Yes, sir.

Q. But that was years after?      A. Yes, sir.

(Witness excused.)

Mr. GARRECHT.—I offer in evidence and will read into the records the minutes of December 4, 1909, the following:

“The following resolution, introduced by Mitchell Stevens, was adopted on his motion:

“WHEREAS, there exists a dispute between the United States Reclamation Service and the West Side Irrigating Company as to the amount of the water appropriated for the irrigation of the lands of its stockholders; and

“WHEREAS, the canal has been enlarged until it safely carries 5,000 miner's inches of water, measured under four and one-half inch pressure, said measurement being made at the several points of diversion of the laterals from the main canal; and

[98] “WHEREAS, said five thousand inches of water, when economically used are necessary for the profitable irrigation of the lands;

“THEREFORE be it resolved, that we, the stockholders of the The West Side Irrigating Company, in annual meeting assembled, authorize the trustees of this company to take such steps in the employment



(Testimony of Mitchell Stevens.)

of counsel, institution of lawsuits, or such other means as are necessary to secure our full legal rights to the water of the Yakima River. All contemplative settlements to be reported to the stockholders for their action, at a meeting called for that purpose."

Mr. BURR.—I would like to offer in evidence a certified copy of the certificate as to the increase of the shares and change of capitalization of The West Side Irrigating Company.

Paper referred to offered and received in evidence, without objection, marked as Plaintiff's Exhibit "B," and returned and filed herewith.

And thereupon a recess was taken until 1:30 o'clock the same day.

[99] SECOND DAY—AFTERNOON SESSION.

Ellensburg, Washington, July 2, 1914.

All present; continuation of taking of testimony resumed pursuant to recess as follows, to wit:

**Testimony of E. I. Anderson, for Defendant (Recalled).**

E. I. ANDERSON, recalled as a witness for defendant, testified:

Q. (Mr. GRAVES.) When did you last see the so-called Gordon flume?

A. I think it was in September or October of 1913.

Q. What do you say as to the appearance of that flume, as to whether it has the appearance of being the original flume constructed there in point of time.

A. It is an old flume; the lumber, the material of

(Testimony of E. I. Anderson.)

which it is made, shows the presence of age.

Q. Do you know whether or not United States officials ever made any measurements there when they have been measuring the water?

A. It has been my understanding—

Mr. GARRECHT.—Do you know of your own knowledge?

A. (Continued.) I have never seen any measurements made there.

Q. You never have seen any measurements made there?

A. Not by the United States Government.

Q. At the point at the Gordon flume shown here on this map, which we introduced in evidence and have marked as Defendant's Exhibit "3"?

A. No, sir.

[100] Cross-examination.

Q. (Mr. BURR.) Now, Mr. Anderson, in this report from which you refreshed your memory this morning on direct examination, I notice the following language, under the head "The West Side Irrigating Company's Inch," found on page 8, the language in question being found at the top of the next page: The orifice through which the water is measured for distribution under this canal is one having an average depth of four and one-quarter inches, and this orifice is said to discharge five inches of water for each lineal inch in length, the bottom of the orifice being three inches above the bottom of the box, constituting a reservoir in which water is raised until there is a pressure of seven inches on

(Testimony of E. I. Anderson.)

the orifice. As it was impossible to determine the discharge for each individual box, an average of the measurements of all the boxes was taken and a box selected for calibrating which most nearly represented the average box." Now, Mr. Anderson, these boxes varied in their nature, did they not?

A. There was a variation in the boxes.

Q. And your tabulation on page 11 shows that the size of the inch in terms of second-feet in the case of some sixty different water users or thereabouts was very materially different for the different places of measuring, does it not?

A. To what page do you refer now?

A. Pages 11, 12 and 13 of your report. For example; these figures of 194 in the first item represent 4.75 [101] second-feet, while down below in the list you will notice here (showing) that 212 inches is equivalent to 4.57 second feet. Now, as a matter of fact, Mr. Anderson, there was no uniformity whatever, was there, in these boxes so that they were scientific?

A. The boxes varied principally in the orifice, the aperture that was made through the sides of the box, and I don't know whether there is a list given—there was some seventy-five boxes along the line of the ditch *were* measured, and I don't know whether those are given in this report or not. I don't recall at the present time, but there were a few instances that I recall where they varied as much as that, where the maximum width that I found equaled four and a half inches and in none of them

(Testimony of E. I. Anderson.)

was the width less than four inches, unless it would be by an extremely small quantity. Now there might have been by an extremely small quantity some of them less than four inches, but not of any moment. But the maximum, as I recall it now, was four and a half inches. That represented a variation practically relative to the width of this aperture and there is where the greatest variation in the boxes, so far as dimensions are concerned, occurred.

Q. Wasn't there some impressure in those cases?

A. Now relative to the pressure and the miner's inch, I determined this inch was as follows. The manipulation of the box, that is, the pressure over the box, was carried on by the ditch rider and in the same manner and without any suggestion on my part—as to that my instructions simply was to him in this box I selected [102] for calibrating was to turn it in that box as he was accustomed to measure it out in the distribution of the water throughout the canal; then I simply took the water he turned in, that is, the number of inches in there, and afterwards calibrated them from a weir measurement down below, and this box was an average box—it was what I took to represent an average box as they are actually all measured.

#### Redirect Examination.

Q. (Mr. GRAVES.) In other words, in the construction and installation of those there would be a little variation, but they were all designed for the same class of measurements, were they not?

A. Yes, same general principles.

(Witness excused.)



**Testimony of Mitchell Stevens, for Defendant  
(Recalled).**

MITCHELL STEVENS, recalled as a witness for the defendant, testified:

Q. (Mr. GRAVES.) Mr. Stevens, when you came to increase your capital stock to four thousand shares, or eighty thousand dollars, I wish you would just state now the [103] method in which you proceeded and how you happened to figure that out—just state it fully.

A. Well, there was an old debt on the company that had been hanging over it for a period of years. In 1903 and 1904, I think it was, Sharpe, Bradshaw and Coleman did a lot of work on the ditch and the ditch incurred quite a large indebtedness, and at the time that we reincorporated a portion of this money—

Q. By reincorporated you mean the time you increased the capital stock, do you not?

A. At the time we increased the capital stock, yes. At that time a portion of this money was desired to pay off that debt, and a portion of the money was to finish the new intake and a portion of the money was to make repairs along the ditch.

Q. Now, were the old shares of stock taken up?

A. Yes, sir. The old shares were taken up and the new shares were substituted therefor.

Q. If a shareholder had one share of stock in the old company how many shares of stock was he given under the new plan?      A. Five shares.

(Testimony of Mitchell Stevens.)

Q. And then there was a balance over that would not be absorbed by the old shareholders at that rate?

A. Yes, sir.

Q. What was done with that?

A. That was sold to the old shareholders. This new stock was covering it, it was figured out that each of the old shareholders would be entitled to this new stock.

Q. And the old stockholders took all of this new stock [104] then?      A. They took it all.

Q. Getting five shares for each share of the old stock for which paid nothing, and for the balance pro rata, they all paid twenty dollars a share?

A. Yes, sir.

Q. And that money you used to pay off your debts and to keep the canal?

A. Yes, sir. We used it to pay off the debts and to make repairs and to finish this new intake.

Q. So, if I understand you correctly, your idea in this was to give the actual value of property—

Mr. BURR.—I object to these leading questions all the time.

Mr. GRAVES.—I think enough appears, I will withdraw the question.

Q. You heard Mr. Anderson's reference to what is called the Gordon Flume?      A. Yes, sir.

Q. When was that flume first built, Mr. Stevens?

A. The time the ditch was first made.

Q. And it is there yet?      A. It is there yet.

Q. This work at the intake, Mr. Stevens, what was that for?

(Testimony of Mitchell Stevens.)

A. It was to secure a more feasible point of taking out the water. We have been putting dams at the head of that ditch; the dams are periodically swept out; we put in a brush and stone dam and that washed out; we put in a sack dam and that washed out; we put in a wooden [105] dam and that washed out and the water was cutting away the head of the ditch and also taking out the old headgate, the old headgate was getting dangerous, and we wanted to have a more feasible point of taking the water out, so as to eventually reduce the maintenance cost of the water, the intake was changed and a new intake put in.

Cross-examination.

Q. (Mr. BURR.) Now, Mr. Stevens, that intake you put in was larger, was it not, than the old one?

A. It was about the same size.

Q. You say it was about the same size; wasn't it a little larger? A. I don't think it was.

Q. Now another thing; that was how much farther up the stream?

A. My recollection is it is seventeen hundred feet.

Q. It is seventeen hundred feet up the stream?

A. Yes.

Q. And how far was it from the old headgate to the point of junction with the newly constructed canal from the new headgate?

A. About seventeen hundred feet.

Q. And the other question I asked you how far along the river was it; now how far down the ditch was it to the point of junction with the old line?

(Testimony of Mitchell Stevens.)

A. Well, I think that is seventeen hundred feet. You see, the river bank was very nearly—

[106] Q. About the same length as the other, was it?

A. About the same length. I never measured the river bank or anything like that, but it is very nearly the same length.

Q. And the old ditch that was abandoned, that was about seventeen hundred feet, too, was it?

A. The new intake dropped into the old ditch just right at the old intake—maybe fifty feet below the old headgate.

Q. I am afraid I don't understand that, Mr. Stevens.

A. The new intake drops into the old ditch, the head of the old ditch, right below the old headgate.

Q. But does it meet the same alignment at that point of junction?

A. Well, it is the same alignment, because of course we aimed to give it the same grade.

Q. From there on?      A. Yes.

Q. But the grade above that point, the grade of the intake would be far larger than it was before, would it not, because it was seventeen hundred feet up the river?      A. How was that?

Q. Your grade will be far larger, the velocity at the intake, because seventeen hundred feet up the river?

A. Oh, no. Having the same grade it would have the same velocity.

Q. Now, Mr. Stevens, with regard to those stock-



(Testimony of Mitchell Stevens.)

holders who bought this new stock; all the old stockholders bought this new stock?

[107] A. There was a few of them that did not.

Q. How much were they allowed to take, any amount they wanted to subscribe?

A. After a certain time—there was a limit to it, a time limit placed, in which the old stockholders were to take all the new stock in proportion to the amount they would be entitled to—in proportion to their stock.

Q. And after that time it was sold to outsiders, was it?

A. No, never sold to outsiders. It was sold to the old stockholders.

Q. How did the men that took it up get anything out of their purchases? You delivered water to them one inch to the share?

A. Certainly one inch to the share.

Q. And this was water they had not been entitled to if they had not bought the stock?

A. No. It would have the effect of lessening, to some extent the water of the fellows that didn't take it up, and the fellows that did take it up would get a little more water.

Q. Well, the fellows that didn't take it up were entitled to water the same lands they had before, were they not?

A. They would be if they took the new stock, otherwise they wouldn't.

Q. They all got a change of stock, didn't they, under this other plan you outlined?

(Testimony of Mitchell Stevens.)

A. Why, the old stock they already had; they were allowed five shares of new stock for each share of old stock.

Q. Now under that stock they were entitled to as much water by virtue of that exchange of stock as they had before [108] the exchange, were they not? They got the same amount of water under this exchange as they did before, did they not?

A. Well, not quite.

Q. How did you arrange to get them to use less water than they had used before when they exchanged that stock?

A. Well, there was some men that got it and who could do with a little bit less water; other men who needed more water—never had enough.

Q. And they bought the new stock?

A. Yes, sir.

#### Redirect Examination.

Q. (Mr. GRAVES.) Mr. Stevens, you say that this intake went up seventeen hundred feet. Are you sure as to those figures?

A. Well, I wouldn't like to be right positive, but that is the best of my recollection, that it was seventeen hundred feet.

Q. You are speaking of that as a matter of recollection? A. Yes.

Q. You were not on the board at the time that was done?

A. I was not on the board at the time the contract was let.

Q. You wouldn't put up your recollection as

(Testimony of Mitchell Stevens.)

against the statement of anybody who had actually made a measurement, would you?

A. No, I didn't actually measure it.

Q. (Mr. BURR.) Well, Mr. Stevens, I would like to ask you [109] if there were not considerable dirt excavations covered in that contract of 1909 at other points than at the upper end of the ditch—were there not considerable enlargements?

A. No. There was slides, backslides; that ditch ran about five miles along the side of a hill and those slides troubled us a good deal; those slides kept sliding in there and filling up the ditch and we expended considerable money in cutting away the bank above to prevent the sliding into the ditch. That made it a more feasible ditch in that way. Along the side hill there was a fill, there used to be more than there is now, the dirt would slip in, slip in and fill up along the outer edge and we had to dig that out. Then there was two or three places in cuts in the ditch that proved to be bad ones. There was one place where we had to blast out—

Mr. BURR.—That will do, Mr. Stevens. You have answered my question.

Mr. GARRECHT.—There is one thing I have not gotten very clear in my mind about this exchange of stock. I desire to examine the witness a little about that.

Q. (Mr. GARRECHT.) How much new stock was given for a share of old stock?

A. Five shares of new stock.

Q. For one share of old stock?

(Testimony of Mitchell Stevens.)

A. Yes, sir. The old stock represented a par value of a hundred dollars; that is to say, the original value of the old stock was in the neighborhood of something like fifty dollars, and this money that had been expended [110] from time to time digging out high places and narrowing one place and taking these slides out and so on had raised the value of that stock until we figured it was worth in the neighborhood of a hundred dollars, and since the new stock represented a par value of twenty dollars we exchanged by giving five for one.

Q. How many shares were in the old company?

A. Six hundred shares.

Q. And how many in the new?

A. Four thousand shares.

Q. Now that you say that a man who held one share of old stock and got five shares of new stock was not entitled to the same amount of water?

A. Well, it would cut him down a little bit.

Q. Well, how much did you cut it down?

A. In proportion to the stock. Of course his stock would figure a little bit less relatively to the whole number of shares than what it did. If he had taken his pro rata new stock it would have been just the same.

Q. That was done by agreement of all the shareholders? A. Yes, sir.

Q. They all agreed to curtail themselves the pro rata of the one thousand shares to the four thousand shares? A. Sir?

Q. That is, in the exchange that was made there



(Testimony of Mitchell Stevens.)

was let one thousand shares, were there not, when you exchanged one of your old shares for five of the new, that left one thousand unexchanged?

A. Yes.

Q. Well, that left one-fourth of the new stock?

[111] A. Yes.

Q. And you say that entire one-fourth was subscribed for by the old stockholders? A. Yes, sir.

Mr. GARRECHT.—Now I want to read into the record from the By-laws of the West Side Irrigating Company, Article II, Section 1:

“The corporate powers shall be exercised by a Board of Trustees composed of five shareholders who shall have been duly elected as trustees of the Company as provided in Article III, Section 1 of the By-laws.”

I want to read from Article V, Section 1:

“The Trustees shall make all regulations for distributing water and regulate the charge for the same; provided, the stockholders shall at all times have precedence over all others to water and the same shall be issued to them in proportion to the amount of stock held.”

Section 5, same Article:

“The Trustees shall have full power to establish the rates and enter into contracts for the sale of the water, and it shall be their duty, on or before the 1st day of April, of each year, to establish the price for which water is to be sold by the company for that year.”

(Testimony of Mitchell Stevens.)

Q. (Mr. BURR.) Mr. Stevens, did you buy some of this stock?

[112] A. Yes, sir.

Q. Do you still own it?      A. Yes, sir.

Q. What are you doing with it? Are you getting more water than you did before?      A. No, sir.

Q. What did you get for your money—you put in some good money, what did you get for it? Some of your neighbors did not buy and yet you bought—aren't you getting more water?

A. Well, sir, my neighbors are using some of this water.

Q. And you are still letting them have it for nothing?      A. Yes, sir.

Q. Aren't you leasing it?      A. No, sir.

Q. Aren't you renting it to them?      A. No, sir.

Q. Haven't you sold it to them?      A. No.

Q. Haven't some of those people that bought this stock sold it?      A. That bought new stock?

Q. Yes, that bought some of this thousand shares of new stock?

A. I can't say as to that. I don't know what they are doing.

Q. Hasn't it a market value?      A. Yes.

Q. Your stock has a market value?      A. Yes.

[113] Q. What is it worth?

A. I judge it is worth about thirty dollars.

Q. What makes it worth thirty dollars if you don't get more water because you own it?

A. Scarcity of water.

(Testimony of Mitchell Stevens.)

Q. You get more water because you own that stock?

A. As a matter of fact, there is no—

Q. Answer my question, please. I say because you own that stock you get more water, don't you?

A. No.

Q. Doesn't the man that owns that stock get more water because of it, because he owns this new stock?

A. Why yes, he gets a little more water than he did under the old stock.

Q. And that is what gives it a value of thirty dollars a share, is it not, the fact that it means water—isn't that true?

A. Oh, there is a good many things enter into the value of it.

Q. (Mr. GRAVES.) Counsel did not give you a chance to answer that last question. When you subscribed for this new stock the benefit you got for it in buying it was paying off the debts of this company and repairing this canal, was not that one of the items? -.

A. Yes, sir.

Q. And those that took the amounts they were entitled to, their amounts were increased and those that did not take their amounts were decreased?

A. Yes, sir.

[114] Q. Instead of dividing it by six hundred shares you now divide by four thousand shares?

A. Yes, sir.

Q. On that basis?      A. Yes, sir.

(Witness excused.)

**Testimony of Jeff H. Lee, for Defendant.**

JEFF H. LEE, produced as a witness for the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Are you a stockholder and officer in The West Side Irrigating Company?

A. I am a stockholder, but not an officer at the present time.

Q. Were you a stockholder in the year 1905?

A. Yes, sir.

Q. Was there a meeting which some of the stockholders attended [115] to meet Mr. Noble in this courtroom?

A. Yes, sir.

Q. What was the purpose of that meeting as near as you recall? Why did Mr. Noble want to see you about it?

A. He wanted to see the various water users of the valley in relation to the amounts they would use.

Q. Were other canal people here at that time?

A. Yes, sir.

Q. What was it Noble said to you, if you recall it?

Mr. GARRECHT.—Same objection.

A. He stated that the Government didn't have in mind to take anything from any companies that was using water, but only to find out their actual needs.

Q. What amount was The West Side Irrigation Company's stockholders claiming at that time? I refer to the amount of water they were claiming that they were entitled to take from the Yakima River under their appropriation.

A. We only knew of measuring water at the lat-



(Testimony of Jeff H. Lee.)

erals, where the water was being taken from the canal. Never had in mind taking readings anywhere else.

Q. And what was your understanding of the amount you were to have at those places?

A. We were to have four thousand inches, what Mr. Noble agreed to give us, as we understood it, and at that time I never had heard of a miner's inch, or an inch per second, and as I understood it at this meeting we was to get eighty cubic feet per second, which represented four thousand inches measured out to us at all times.

[116] Q. Now, you had some acquaintance with the other stockholders, I suppose, and it was talked among the stockholders somewhat around the district about this matter? A. Yes, sir.

Q. Do you know of any stockholder who ever consented to such contract as was actually signed after they discovered what measurement was to be used?

A. No, sir.

Q. What would you say as to the attitude of all the stockholders that you came in contact with when they discovered what sort of contract their directors had made—what was their attitude toward it?

A. They were all greatly disappointed, for there was none informed as to the measurement of water. We never had taken no measurement as to how much water came into the ditch at the intake; we didn't know.

Q. Had your right to the water of the Yakima

(Testimony of Jeff H. Lee.)

River been in any wise challenged by anybody, had anybody ever interfered with it or challenged it?

A. No, sir, not even thought of.

Q. When Mr. Noble came here to meet the water users and made that talk, what was the attitude of the people present as desiring to co-operate on fair and equal terms with the Government?

A. The people of the valley was very enthusiastic, because Mr. Noble made mention of the fact that in three years, or about that—we had been planning for a ditch, called the High Line here, and it would be built if we got to an understanding of how much water belonged to those below us that they could be sure of [117] that they could depend on in building this ditch, and the amount of water it would be necessary to store at the lakes.

Q. Was anything ever said to the stockholders by Mr. Noble or by anyone else that you were to relinquish or abandon any water that you had theretofore appropriated and had a right to use?

A. No, sir.

Cross-examination.

Q. (Mr. GARRECHT.) When did you first make the discovery about the mistake that you claim?

A. I was not on the board at the time that Mr. Noble was here, neither was I on the board at the time the contract was signed, and I couldn't say as to the date, but some months after.

Q. Well, this talk that they had here in the courthouse with Mr. Noble, that was before the trustees entered into the agreement?

(Testimony of Jeff H. Lee.)

A. I wouldn't be positive, but that is my recollection.

Q. Your recollection is that it was?      A. Yes.

Q. Now, the date of that contract was some time in October, 1905. Do you remember being at this meeting in January, 1906, where this matter was discussed by the stockholders?

A. Excuse me; was that at the date when Mr. Goodwin made a motion that we relinquish no rights whatever?

Q. Mr. Stevens seems to have made the motion to which you [118] refer at the time.

A. Yes, sir; I was there.

Q. That was January 2, 1906, that was the date of that meeting or about that time. Now, do you know whether it was about that time that they consulted with Judge Graves?      A. I do not.

Q. What Mr. Noble said was that he wanted to ascertain the actual needs of the people who were irrigating from the river; was that it?

A. That was my understanding.

Q. And that they had to find out what the different irrigators were going to insist upon before they could go ahead with their work?

A. No, sir. He didn't seem to be at all particular; he wanted only approximately that they might go ahead with their work.

Q. I understood you to say that he said something about the High Line ditch in connection with knowing definitely what appropriations were being made from the river.

(Testimony of Jeff H. Lee.)

A. He made mention—I don't remember the wording, but he made mention of that fact, that they had in mind that High Line and I think there had been a survey made.

(Witness excused.)

**Testimony of Burt Pease, for Defendant.**

[119] BURT PEASE, produced as a witness for the defendant, having been first duly cautioned and sworn, testified:

Q. (Mr. GRAVES.) Mr. Pease, you were secretary at the time this contract was signed?

A. Yes, sir.

Q. Do you recall where it was that the officers signed this contract?

A. I would not be positive, but it is my recollection that it was in Judge Kauffman's office, here in Ellensburg.

Q. And give us your best recollection of what was done with it.

Mr. GARRECHT.—This is subject to the same objection.

A. The best of my recollection is that the contracts were signed in duplicate; that the Government did not sign the contract yet, but it was left with Mr. Kauffman to be signed by the Government and returned to the company.

**Cross-examination.**

Q. (Mr. BURR.) You are the secretary of this company, are you, Mr. Pease?      A. No, I am not.

Q. You were during what period?



(Testimony of Burt Pease.)

A. I couldn't tell you exactly. I couldn't give you the dates now; it has been so long, but I was secretary of the company for about five years successively.

(Witness excused.)

[120] Mr. GARRECHT.—I want to recall Mr. Stevens for a question or two.

**Testimony of Mitchell Stevens, for Defendant  
(Recalled).**

MITCHELL STEVENS, a witness for the defendant, recalled for further

**Cross-examination.**

Q. (Mr. GARRECHT.) The time you called Judge Graves on the phone with respect to the water rights of this West Side Irrigating Company was about the time of this January, 1906, meeting when the stockholders were apprised of the Government's claim—is that right?

A. No. It might have been the summer following—it was in the summer.

Q. Probably in the summer of 1906?

A. Yes, I think so, 1906 or 1907, I couldn't be positive without looking up the correspondence. I could give you the date by looking up the correspondence.

Q. That is what we would like to get at as near as we can, Mr. Stevens, the date of that.

A. I have it at home.

Q. But you think it was the summer following that January meeting?

A. It was the summer following or the year after

(Testimony of Mitchell Stevens.)

that. It was the first time any warning was given to us we would have to turn water out of the ditch.

(Witness excused.)

[121] Mr. GRAVES.—I think that is all the testimony we care to offer.

DEFENDANT RESTS.

[122] DEFENDANT HAVING RESTED ITS CASE, THEREUPON PLAINTIFF OFFERED EVIDENCE IN REBUTTAL, AS FOLLOWS, TO WIT:

**Testimony of J. C. Yearwood, for Plaintiff (in Rebuttal).**

J. C. YEARWOOD, produced as a witness for the plaintiff, in rebuttal, having been first duly cautioned and sworn, testified:

Q. (Mr. BURR.) Mr. Yearwood, in the change of the intake there, what was the difference—Mr. Stevens gave his recollection at something like seventeen hundred feet—do you know what the actual distance was?

A. Yes, sir. The actual distance was 1050 feet, from about twenty-five foot on the river at the intake at the upper end of where it intercepted the old ditch at the lower end. I packed the tape or helped to survey the land out, and know that I am absolutely right. It is 1050 feet to twenty-five feet of the river on the water at the upper end, making just about 1075 feet from the water to the lower end here.

Cross-examination.

Q. (Mr. GRAVES.) You say it is 1050 feet to

(Testimony of J. C. Yearwood.)

within twenty-five feet of the river?

A. To within twenty feet from the water in the river.

Q. Now a change has been made in the place of diversion from the river. Now, how much up the stream did you go from the old place of diversion to the new one?

[123] A. Why, I would say probably 850 or 900 feet above that old intake.

Q. That is pretty close, is it?

A. Not to exceed that. You see, the lower end of the new intake strikes the old ditch away below the upper end of the old intake—quite a bit down. It made our ditch straighter and it put us a little bit further away where it was cutting us.

Redirect Examination.

Q. (Mr. BURR.) In a straight line it would not be that far?

A. No, it is a little crooked, but I was just a-going on the survey line that I helped Mr. Ellison survey, and it was just a thousand and fifty feet to where he said "Zero" up at the upper end. That was about twenty-five feet of the water.

Q. Is it pretty slow there or pretty swift?

A. That is not a steep grade.

Q. You have had some trouble with that ditch and with the current there, have you not?

A. No, sir, not trouble at all. All the trouble we ever had was to get water in it.

(Witness excused.)

Mr. GARRECHT.—The Government wishes to offer in evidence certified copies of the report of the progress of [124] stream measurements for the calendar year 1904, being water supply of irrigation paper number 135, pages 109, 110 and 111, the mean daily discharge of second-feet of the West Kittitas Canal, near Thorp, Washington, for 1904.

Mr. GRAVES.—I object to it on the ground that it is wholly incompetent; that there is no statement here as to the method of measurement and there is no statement by any person who took the measurements, and that these readings are objected to unless there is accompanied with them the oath of the party who made the measurements. And further, that conditions of the canal as to whether it was shut off because of repairs being made does not appear here. We should want to put in some sur-rebuttal as to that, to show that at the particular time we were not using the old canal that season because of the extension work we were doing.

Book containing pages referred to offered and received in evidence, and marked as Plaintiff's Exhibit "E" and returned and filed herewith.

Mr. GARRECHT.—We offer report of stream measurements for the calendar year, Department of the Interior, being water supply and irrigation paper number 178 and particularly page 55 referring to the West Kittitas Canal, near Thorp, Washington.

Mr. GRAVES.—That is objected to upon the same grounds as last above.

Book containing page referred to offered and re-



(Testimony of E. I. Anderson.)

ceived in evidence and marked as Plaintiff's Exhibit "F" and returned and filed herewith.

**Testimony of E. I. Anderson, for Plaintiff (Recalled in Rebuttal).**

[125] E. I. ANDERSON, recalled as a witness for plaintiff in rebuttal, testified:

Q. (Mr. GARRECHT.) Mr. Anderson, I call your attention to Plaintiff's Exhibit "E," being report of the progress of stream measurements for the calendar year of 1904, at pages 109-10-11, and ask you, Mr. Anderson, to examine that and state if that is the official government report to which you referred in the report which you made as to the water measurements in the West Side Irrigation Canal, in the report you made to Judge Graves?

A. I will state this, that in my report to Judge Graves I set out the record results of the company as made on the West Side Ditch for 1904 as given in water supply paper number 135, page 109, of the United State Geological survey, and that is the notation that I have in my report concerning this document. The document just handed me is water supply and irrigation paper number 135, and my attention has been called to pages 109-10--11 in this report, and on page 111 of this report I find a table purporting to give the amount of the daily discharge in second feet of the West Kittitas Canal, Thorp, Washington, for the year 1904, which I find upon comparison with the table as given in my report to Judge Graves that so far as I have examined it agrees with that substantially

(Testimony of E. I. Anderson.)

with that given in this paper, but evidently was not copied from the same paper, for the reason that in my report to Judge Graves the quantities were given apparently to the nearest tenth of a second-foot, while in the table here they [126] are given whole numbers only. I am at a loss to account at the present time for that discrepancy. What I intended to give him and supposed I had given, was a copy of water supply paper number 135. I have not found any substantial discrepancies; the differences occur, as, for example, in the table in the publication handed to me a moment ago, on the 4th day of July the discharge in that table is given as 43 feet; in my report to Judge Graves, in the table from which I copied it is 43.8; and the 5th of July, according to the Government publication handed, the discharge is 50 second-feet, while the table to him I find it is 49.6, and in looking over the tables I have not been able to find any greater discrepancies than that but it shows it is not exactly the same table for some reason or other, from which this was copied, but I am unable to—

Q. But you did refer to the Government report handed you, water supply paper number 135 and to this particular report?

A. It seems to be the same Government report, but there appears to be that discrepancy which I noticed, which makes me think it cannot be from the same table.

Q. I now call your attention to Plaintiff's Exhibit "F," being water supply and irrigation paper number 178, and particularly to page 55 thereof. I will

(Testimony of E. I. Anderson.)

ask you if that is a publication which was referred to by you in your report to Judge Graves?

A. That is a publication to which I referred to in my report to Judge Graves.

[127] Mr. BURR.—From the gauge heights, the daily gauge heights that were taken, you could compute those totals, with the other data given, could you not?

A. For the years for which the gaugings were made, for that particular use for which the gauging was applicable, yes.

Cross-examination.

Q. (Mr. GRAVES.) Mr. Anderson, you made this report for my information as to what the Government was claiming? A. Entirely.

Q. And you are not vouching for the authenticity of that matter at all, you know nothing about that?

A. This matter was simply given for your information as to where matter of that kind could be obtained. It was simply a reference.

Q. Just a reference, nothing else?

A. That was all.

Redirect Examination.

Q. (Mr. GARRECHT.) And that was to advise Judge Graves of the readings as published in the report of this West Side Irrigation Company's canal?

A. It was done pursuant to what I conceived an obligation to give Judge Graves all the information I could relative to that canal from the Government standpoint.

(Testimony of E. I. Anderson.)

Q. (Mr. BURR.) Mr. Anderson, I would like to have you look [128] over paragraph numbered 2 there on the first page of your report and see if the point you were not informing Judge Graves about was the actual amount diverted.

A. Which paragraph do you refer to, where I have formulated this matter in the form of a query?

Q. Yes, the points you intended to cover there in that one paragraph numbered second.

A. That paragraph was inserted by myself as a preliminary—it was laying a base to what I conceived this report should cover. I had not been asked that I recall now particularly by Judge Graves or anyone else to report upon the maximum quantity of water diverted from the Yakima River, but it was inserted for the purpose of laying a base upon which the report should follow, that is, and show that, if I was able to do it from the information I had.

Q. But you were not giving your best understanding and your best information upon the point as to what had been the maximum quantity of water diverted from the Yakima River by the company during in each year that had elapsed since the canal had been in operation? Is not that exactly what you were purporting to do, Mr. Anderson?

A. I was endeavoring to give Judge Graves—

Q. Can't you answer that question? Isn't that what you were reporting upon, just as it reads there, or were you reporting on something different?

A. Do you mean by that question that I incorporated in my report copies of these various tables in



(Testimony of E. I. Anderson.)

these publications as an answer to that question?

Q. Yes. Were you not giving that as your best information [129] on that subject?

A. I was giving it as all the information extant, but not for the definite purpose of showing these matters. It was giving him information as all the information extant; I could not have in mind that those things would constitute an answer to that particular question.

Q. You had no reason to question its correctness?

A. I have no reason to question it, but just the same I was not vouching for them.

(Witness excused.)

Mr. GARRECHT.—We now offer in evidence certified copy of water supply paper 291, surplus water supply of the United States, 1910, and calling particular attention to page 233 to The West Kittitas Canal, near Thorp, Washington—the report thereon.

Mr. GRAVES.—I object to this upon the same grounds; it is entirely incompetent; it does purport upon its face to give with any degree of accuracy the measurements.

Book containing page referred to offered and received in evidence and marked as Plaintiff's Exhibit "G" and returned and filed herewith.

Mr. GARRECHT.—I wish to offer in evidence three blue-print sheets, copies of original records in the office of the United States Geological Survey, and containing [130] results of stream flow investigations on West Kittitas Canal, near Thorp, Washington, for the year 1911.

Mr. GRAVES.—We object to this upon the ground that they are not the best evidence and wholly incompetent, and the same objections, without specifying in detail, as made to Plaintiff's Exhibits "E" and "F."

Blue-print sheets referred to offered and received in evidence and marked as Plaintiff's Exhibit "E," and returned and filed herewith.

**Testimony of Paul Taylor, for Plaintiff (Recalled in Rebuttal).**

PAUL TAYLOR, recalled as a witness for plaintiff, in rebuttal, testified:

Q. (Mr. BURR.) Mr. Taylor you testified as to your qualifications yesterday, and I would like to ask you one question more. Are you in charge of all the hydrographic work of the Yakima Valley for the United States?

A. I am.

Q. The Reclamation Service is in charge of the hydrographic work now, is it, or the Geological Survey?

A. The Reclamation Service.

Q. Have readings been taken during the years that the evidence so far put in has covered with regard to—is there a complete set of readings throughout all those years?      A. No.

[131] Q. Which years are lacking—since 1904, I mean?

A. The years lacking are 1906, 1907 and 1908.

Q. And we have put in all the official records available, have we, prior to 1909, in having put in 1904,

(Testimony of Paul Taylor.)

1905 and 1909?      A. To my knowledge we have.

Q. Now, Mr. Taylor, with regard to water supply paper for 1905 being number 178; I would ask you whether the daily discharges into the defendant's ditch are given or not given.

Mr. GRAVES.—I object to his testifying to anything contained in that report on the same grounds I have stated before. I do not want to waive that objection.

A. There are no daily discharges given. There are three actual measurements given, made on June 30, July 10 and August 29, respectively.

Q. Are there gauge heights given, daily gauge heights?      A. Well, for a portion of the season.

Q. Now then, from those daily gauge heights is it possible to determine the daily discharge of the other data there given?      A. It is.

Q. Have you computed them?

A. I have them computed under my direction and looked over the datum myself.

Q. Checked the data?      A. Checked the data.

Q. Can you state whether or not that gives the daily discharges that you so checked?      A. It does.

[132] Q. Is this the sheet?      A. It is.

Mr. BURR.—I would like to offer this sheet in evidence as Plaintiff's Exhibit "I," as the daily discharges for the year 1905 into defendant company's canal.

Mr. GRAVES.—I do not understand where he got this.

(Testimony of Paul Taylor.)

Q. (Mr. GRAVES.) Where did you copy this from?

A. I computed that from studies made in connection with these gauge heights and these measurements.

Mr. GRAVES.—We object to it upon the ground that it is based upon a report of which no proof has been made of its correctness.

Sheet referred to, offered and received in evidence and marked as Plaintiff's Exhibit "I" and returned and filed herewith.

(Witness excused.)

Mr. BURR.—That closes plaintiff's rebuttal, with the understanding that we are to call Mr. T. A. Noble, who has been quoted in the evidence, at the convenience of counsel.

Mr. GRAVES.—That is agreeable. I think I want to offer some testimony in rebuttal of your rebuttal testimony.

**Testimony of Mitchell Stevens, for Defendant  
(Recalled in Surrebuttal).**

{[133] MITCHELL STEVENS, recalled as a witness for the defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) Mr. Stevens, I wish you would state the condition of the canal, the West Side Irrigating Company's canal in the years 1904 and 1905, and what had caused that condition and what effect that condition had upon the flow of water into the canal during those years.

A. Also 1903, for that matter.



(Testimony of Mitchell Stevens.)

Q. Yes, state as to 1903, 1904 and 1905.

A. In 1903 and 1904 Sharp, Bradshaw & Coleman enlarged that ditch, but when they come to run the water in the ditch we found weak banks that would not stand the pressure and could not stand the pressure of a full ditch, and along about that time, maybe 1905, I can't just remember the date, there was one whole section of ditch—there was 800 feet of ditch that we put in a board bank into the ditch to make the bank hold, to make the bank stand, and also there was slides that kept coming into the ditch and troubling us so we couldn't get the required amount of water through, and the ditch was changed in two places and flumes put in to avoid those slides, and also the side hills in some places were cut down from—well, I should judge a hundred feet back on the side hill for to reduce the frequency of the slides.

Q. What did you do on account of those weak banks, what did you have to do as to the volume of water flowing in the stream during those years?

A. We could not run it to its full capacity. If we put [134] it up to its full capacity the weak banks would give way.

(Witness excused.)

Thereupon an adjournment was taken to some time to be hereafter agreed upon by counsel for respective parties.

[135]    Federal Building, North Yakima, Wn.,  
9:30 A. M., March 22, 1915.

PRESENT—Mr. GARRECHT and Mr. BURR, for  
Plaintiff;

Mr. GRAVES, for Defendant.

Continuation of proceedings pursuant to agree-  
ment as follows, to wit:

**Testimony of T. A. Noble, for Plaintiff (in Re-  
buttal).**

T. A. NOBLE, produced as a witness for the  
plaintiff, in rebuttal, having been first cautioned  
and duly sworn, testified:

Q. (Mr. BURR.) Mr. Noble, you were in what  
employ during the year 1905?

A. United States Reclamation Service.

Q. In what capacity, Mr. Noble?

A. In 1904 and the spring of 1905 I was district  
engineer for the State of Washington.

Q. Reporting to whom?

A. To the chief engineer, in Washington, D. C.

Q. What is your profession, Mr. Noble?

A. Civil and hydraulic engineer—was at that  
time.

Q. Now in 1905 will you state what the activities  
of the Government were, if any, in the Yakima  
Valley, very briefly?

A. In 1905, I think in the month of April, we  
started in to investigate, in a preliminary way, prac-  
tically all of the projects and available projects tak-  
ing water from the Yakima river and its tributaries.

Q. Were you doing any construction work?

A. No, sir.

(Testimony of T. A. Noble.)

[136] Q. Why not?

A. We had not yet decided what projects were feasible here in the valley, or whether any was feasible.

Q. Now what doubt was there with regard to the feasibility upon grounds other than engineering grounds?

A. The question of the right to take water for irrigation from the streams in the basin.

Q. There were other rival appropriators, you mean?

A. We had found the year before—I should state that the year before I had two men and one or two assistants with them, hired here locally, Mr. George Bliss, who was an engineer in the service, and Mr. George Harley—

Q. I do not believe we need all that, Mr. Noble. I want to make the record as brief as possible.

A. I was going to say they had found out in their investigations that all of the water of the Yakima river had been appropriated.

Mr. GRAVES.—I shall object to that.

Q. We do not need that, that has been stipulated, Mr. Noble.

A. Well, you asked me for the reason and I thought that was pertinent.

Q. It has been stipulated in the record that the secretary had required that certain conditions be met before the Yakima Project could be constructed. Will you state whether the Government, or rather what part the Government was taking in securing

(Testimony of T. A. Noble.)

these agreements from the various appropriators—what, if any, part the Government was taking in that matter?

A. The part that was taken was to put before the people here in the valley the necessity of settling definitely [137] the existent rights to certain definite quantities of water. The statement that was made by myself and the other engineers in charge here at that time was that no project could be undertaken in the valley until these various appropriators had all signed an agreement agreeing to limit their rights to such quantities of water that the total amount of all those claims as signed up would not be more than the water which flowed in the Yakima river. That is the substance of our position toward the water users.

Q. Did you go to Ellensburg for that purpose, Mr. Noble?      A. I did, yes, sir.

Q. Did you meet the trustees or stockholders of the defendant in this case?

Mr. GRAVES.—Be definite as to whether it was the stockholders or trustees.

Q. Did you meet the trustees?

A. I am not absolutely certain. I recall definitely of meeting the stockholders of the Cascade Irrigation Company, the canal on the opposite side of the river, of which company Judge Kauffman then was their attorney, and the stockholders or the trustees of the West Side Irrigating company, I do not definitely recall a meeting with them as a stockholders meeting or as a trustees meeting. I met



(Testimony of T. A. Noble.)

quite a number of the stockholders and had talks with them, I recall that very distinctly.

Q. Was it at a public meeting at which the various stockholders and representatives of the West Side Irrigating company and other organizations were present?

A. Yes, sir. I asked for a public meeting through the Commercial [138] Club there where all of those interested in the diversion of water from the river would be present, and I addressed that public meeting and stated the position that the Government took in this matter, practically along the lines that I have stated.

Q. Now, Mr. Noble, with regard to these limiting agreements that were to be secured. Was the amount which was to be stated in the limiting agreement a definite figure or was it a varying figure; was it to be an appropriation, or was it to be an exact figure?

A. I didn't draw up the final agreement; I participated in the negotiations leading up to that agreement, but I could not testify as to who finally had that agreement signed; I didn't. The final negotiations leading up to the exact quantity of water that was put in that agreement, I didn't have anything to do with those final negotiations. The quantity of water which they would limit themselves to was pretty fully discussed, however, and my contention was, as I have stated, that in order for the Government to come in this valley and undertake a project it was necessary that the water rights all be confined

(Testimony of T. A. Noble.)

to a quantity that would not exceed the flow of the stream, and that if they signed for more than was actually diverted by them then somebody else would have to sign for less, and that it was up to them, the people as a whole and the committees, to determine what each could or would sign for.

Q. Was the final closing of that contract a matter that was up to the Government or up to the citizens committee?

A. It was first put before the Commercial Club here in [[139] North Yakima and they appointed a committee and we followed the same process there in Ellensburg. I believe there was a committee appointed there of which Judge Kauffman was a member, and our negotiations were largely through that committee, though we met and talked with the individual stockholders and with the ditch owners and we addressed them at public meetings, explaining as near as we could what the Government purposed to do and the conditions under which it would be possible and feasible for them to undertake the project.

Q. The amount of water stated in the limiting agreement, did you understand that that was to be a definite figure or was that to be an approximation merely?

A. I think I stated specifically at that public meeting that they would have to settle definitely upon a given amount of water that would be diverted by each of their canals and that would have to be such a figure in each case that the total would not exceed the flow of the river.

(Testimony of T. A. Noble.)

Q. The total aggregate of all the limiting agreements?     A. Yes, sir.

Q. Did the Government in these negotiations, in so far as the Government made any overtures to the farmers in this matter, ever make any promise as to the construction of any particular unit on or before any date or during any period of time?

A. No, sir, not through me.

Q. Or through anyone who was present while you were present?

A. I was the only Government employee present there at that public meeting, and I think also at these stockholders [140] meetings, whatever they were, that I attended.

Q. Now, Mr. Noble, the amount mentioned in the limiting agreement signed in these various cases, and in particular the West Side case, was that to be measured at the river or was that the aggregate of measurements throughout the entire length of the West Side ditch?

A. The total quantity of water diverted from the river as measured by the representatives of the Reclamation Service that had certain gauging stations, one on each canal, and the quantity of water was determined at these gauging stations. Those gauging stations generally were as near the head of the canal as the conditions would permit. In selecting a gauging station it is necessary to select a place where the conditions are favorable to get an accurate measurement.

Q. What would be the effect upon the situation,

(Testimony of T. A. Noble.)

very briefly, if the limiting agreement was to be construed as mentioning a total aggregate figure composed of the total of the various diversions from the West Side ditch instead of a single diversion at the point of diversion from the river or near that?

Mr. GRAVES.—That is objected to as asking for the argument of the witness and as not calling for any fact.

Mr. BURR.—I will not press the question.

Q. When did you leave the service of the Reclamation Service?      A. January 1, 1907.

Q. Were you afterwards connected with the United States Government in any of its branches?

A. No, sir, except that I was a witness at one time in [141] this room, the only time I was ever employed after that by the Government.

Q. Did you ever serve as water commissioner for the Yakima valley?

A. In the employ of the State; that is, I was paid by the county, but I believe it is considered a state appointment.

Q. When was that first, Mr. Noble?

A. For the season of 1908.

Q. And in that capacity did any member or trustee of the West Side Irrigating company have any conversation with you that you recall?

A. Yes, sir. I met Mr. Mitchell Stevens at that time and went over the situation with him there on his canal.

Q. Which canal do you mean?

A. The West Side canal. We went up to the head



(Testimony of T. A. Noble.)

of the canal with him and passed the Government gauging station there.

Q. How did you come to do that, Mr. Noble?

A. In my capacity as water master for this district.

Q. Water commissioner?

A. Water commissioner, yes, sir, as I believe it is called in the law.

Q. What was said at that time? Just the substance of it as far as you can recollect.

A. Mr. Stevens and I had other business together; I gave him some advice as to putting in concrete head gates; the most of our conversation was along that line. I don't recall that very much was said about their limiting agreement. I believe I did tell him that they were [142] diverting more than they had stated in that agreement, and I believe that Mr. Stevens told me that they felt that they had a right to divert more and they did not feel bound by that agreement. That is as near as I can recollect the substance of our conversation referring to this matter.

Q. Did you ever have any conversation with any member of the West Side Irrigating company, the defendant corporation, after the signing of that limiting agreement?

A. That was after the signing.

Q. Besides that conversation I mean.

A. Well, before I had seen Mr. Stevens I hunted up the—

(Testimony of T. A. Noble.)

Mr. GRAVES.—Just answer the question, Mr. Noble.

A. Yes, I did have a conversation with their ditch tender.

Q. When was that, when you were commissioner?

A. Yes. I think his name was Mr. Lee.

Q. While you were connected with the United States Reclamation Service did you ever have any talk with any of them after the agreement was signed?

A. No, sir. I thought you meant while I was water commissioner.

Q. Then while you were with the Reclamation Service you never had any conversation, except as you have referred to, conversations before the limiting agreement was signed, with any of the members of the West Side Irrigating company?

A. No, sir, I did not have any after that time. I left the service about that time or soon after that.

Q. (Mr. GARRECHT.) Then before you left the service you [143] never made any complaint to them that they were using too much water?

A. No, sir, I did not.

Q. That conversation occurred after you became a water commissioner?      A. Yes, sir.

Q. And that was entirely in your official capacity as a water commissioner?      A. Yes, sir.

Q. Did you have anything to do with these agreements after they were signed up?

A. I never saw them; I was not present at the execution of any of those agreements. I was in

(Testimony of T. A. Noble.)

the preliminary negotiations leading up to them, but the final signing of those agreements was out of my hands.

Q. In 1904, 1905 and 1906 you had charge of the Government work with reference to those streams?

A. I did, yes, sir.

Q. Did you know at that time how much water was being diverted by the West Side Irrigating company? A. Yes, sir.

Q. Could you state how much it was?

A. Yes, sir.

Q. (Mr. GRAVES.) Before stating how much it was would you mind stating how you know it, what means of information you had and whether it was personal knowledge on your part or something reported to you?

A. By the water supply papers published by the United States Geological Survey.

[144] Q. (Mr. GARRECHT.) And was that data compiled by you? A. Yes, sir.

Q. Then you may state what it was that they diverted.

A. In 1904 it was a trifle less than 70 cubic feet per second was the maximum amount, as shown by records of gauge height in the canal at the station; in 1905 it was very close to 75 cubic feet per second, taking even figures, and in 1906 I believe there was no station maintained there.

Q. (Mr. BURR.) Did you know W. J. Light-foot?

A. He was in my employ, yes, sir. That is, he

(Testimony of T. A. Noble.)

was employed under my direction, I should say.

Q. Will you state whether that (showing) is a photostat copy of Mr. Lightfoot's signature and figures.      A. Yes, sir, that is his signature.

Q. And that sheet (showing)?      A. Yes, sir.

Q. Is that part of the data that you referred to as having been taken on the flow of the steram?

A. Yes, sir.

Mr. BURR.—I offer the document in evidence.

Q. (Mr. GRAVES.) Mr. Noble, did you take any readings yourself on that canal?

A. A few, yes, sir. I was up there once or twice to check these measurements up.

Q. And this instrument that has been handed to you, that report is made up by a man in your employ?

A. Well, he was in the employ of the Government.

[145] Q. But under your direction?

A. Yes, he was under my direction.

Q. He made these readings himself, didn't he?

A. The readings of discharge he made himself, yes, sir.

Q. You yourself did not stay upon this canal and take these measurements

A. No, sir, He did it.

Mr. GRAVES.—I object to the document offered as incompetent as shown by the evidence of the witness.

Document referred to offered in evidence, marked as Plaintiff's Exhibit "J" and returned and filed herewith.



(Testimony of T. A. Noble.)

Q. (Mr. GARRECHT.) Who was this Judge Kauffman that you referred to?

A. He was not a judge then, he was a lawyer in with Kauffman & Frost, and at that time he was attorney for the Cascade Canal that I know of specifically; whether he was for any other canals there at the time I don't know

Q. He was not in the service of the Government?

A. No, sir, not in any sense.

Cross-examination.

Q. (Mr. GRAVES.) You were in the service of the Government in 1906, Mr. Noble?

A. Yes, sir, up to January 1, 1907.

Q. In your capacity as district engineer of the Yakima Project you were interested in having the Government [146] come into this valley?

A. Yes, sir.

Q. And you were interesting everybody up and down through the valley to come under conditions so that the Secretary of the Interior would come into this valley with this project? A. Yes, sir.

Q. You made speeches at public meetings did you not? A. Yes, sir.

Q. You undertook to explain to the people the views that were entertained by the Reclamation Service and the secretary at that time?

A. Yes, sir.

Q. In the signing of these agreements were you willing they should put into these agreements an arrangement for more water than they had appropriated, or how were you limiting them? In other

(Testimony of T. A. Noble.)

words, what means did the Government have for limiting them?

A. That proposition was more or less left to the committees appointed by the Commercial Clubs to take this matter in charge, to act as a go-between between the Government and the appropriators.

Q. That is, you were not conveying any water to them, nor were they conveying any water to the Government? A. No, sir.

Q. Is that correct? You were simply trying to approximate—estimate—the amount of water which their uses required and which they were entitled to under their appropriation?

A. No, sir. I would not state it that way, no, sir.

[147] Q. How would you state it in that regard, Mr. Noble?

A. All the statements that I made at these public meetings and to the individuals and every one else in this valley, was on the basis that I have previously stated in this testimony, that they must sign for such amounts, each one, so that the aggregate amount of all these signed agreements would not exceed the total flow in the river.

Q. Did you expect any one of these water users to relinquish any water they had actually been using? A. No, sir, I didn't expect them to.

Q. Let me put it this way: Was it not a fact that you wanted each one of those water users to state the water he had been using, so far as he knew and so far as you knew?

(Testimony of T. A. Noble.)

A. We didn't need to have them state because we had measured that.

Q. You knew then, did you, the amount of water?

A. That they had actually used in 1904 and 1905.

Q. They were using 80 second-feet in the West Side canal in 1904 and 1905. A. No, sir.

Q. Why did you expect an agreement limiting it to 80 cubic feet? A. I didn't expect it.

Q. You did not know anything about that?

A. I did not know anything about the final limitation, as I said.

Q. You knew that in the condition of the canal in 1904 and 1905, on account of recent changes in it, it would not [148] carry the full amount of their original appropriation?

A. I didn't know that. I knew the actual condition of their canal personally.

Q. A cubic foot or a second-foot of water means the amount of water that will flow through a cube with a section one foot *one foot* square in one second of time. A. Yes.

Q. That is correct, is it?

A. That would be a flow of one cubic foot per second.

Q. And a miner's inch or a statute inch is determinable by the various pressures to which the water is subjected; that is true, is it not?

A. Yes, it varies with the pressure and also with the nature of the orifice.

Q. The most convenient method and the one most generally adopted is the amount of water that will

(Testimony of T. A. Noble.)

flow through a thin-edged orifice one inch square, with a pressure of four inches over the center of the opening. That is the method of measurement usually adopted, is it not, Mr. Noble?

A. Why, I don't think so. It used to be generally adopted as a method, but there were all sorts of variations as to the pressure.

Q. That is the method known as measuring water under pressure.      A. Yes.

Q. And measuring 50 inches or 50 inches measured under that kind of pressure exactly equals one second-foot?

A. Not exactly. It depends on the pressure.

Q. That is what I say, 50 inches measured under a four-inch [149] pressure over the center of the opening exactly equals one second-foot.

A. This is, I believe, the relation prescribed by law in one or two of the western states, I do not know just how many.

Q. The point is, not as to your actual recollection as to the law, but—

A. But that is all I know about it.

Q. Well, I say 50 inches of water measured in that way exactly equals one second-foot, does it not?

A. Not necessarily.

Q. Under 4-inch pressure?

A. Not necessarily. It depends on the nature of the orifice.

Q. Exactly so.

A. If the orifice has rounded edges, why, there will be a larger quantity of water than if it has



(Testimony of T. A. Noble.)

square edges and so forth. That is why I say that.

Q. When I say to you though without qualification as to those points, when I say to you that an orifice one inch square, with a pressure of four inches over the center of the opening, other things being equal, that measures what is sometimes called an inch of water? A. Yes, sir, it does.

Q. And 50 inches of that water will exactly equal one second-foot, will it not?

A. Well, for practical purposes, yes, sir.

Q. And 4,000 inches of water so measured would mean 80 second-feet? A. Yes, certainly.

[150] Q. How do you suppose that 80 feet was agreed on up there; have you any idea about it, Mr. Noble? How did they happen to hit on 80 feet?

A. As near as I can recall something was said there, either between myself and some of the members of the West Side Irrigating company or somebody else, that they needed 4,000 miner's inches of water in their canal.

Q. That was the idea about that?

A. Yes. That is about all I recollect anything about.

Q. And 4,000 miner's inches would be understood to mean 80 second-feet, wouldn't it?

A. Well, I don't know what their pressure was.

Q. Oh, no; but I say in talking—

A. It would under the pressure you mentioned—for practical purposes it would.

Q. But in talking like that in public to those people— A. Yes.

(Testimony of T. A. Noble.)

Q. —and they would say that they wanted 4,000 inches of water you would immediately say that meant 80 second-feet, wouldn't you?

A. Well, I would want to know first what their pressure was, and I didn't know what their pressure was.

Q. You don't get down so technical, do you, when you are addressing a public meeting?

A. Well, I am perhaps a little more technical, Mr. Graves, than a lawyer would be there because that is the first thing that would pop into my mind, as to whether the conditions were a 4-inch pressure or 1-inch pressure or what the conditions were that would develop this.

[151] Q. I want to get at this idea, Mr. Noble. Instead of making a contract with these people you were going around holding public meetings to influence public sentiment to making a public agreement along certain lines that you have mentioned.

A. Well, I don't think exactly that, Mr. Graves. My object in going up there was to get in touch with those people and explain to them the position of the Government regarding a project in the valley, and urge upon them the necessity of settling their water rights.

Q. You know that this question of water rights was always a matter of approximation, do you not, as to how much water anybody was entitled to? Now take the Sunnyside; nobody knew the amount that the Sunnyside was entitled to at that time.

A. Oh, yes.

(Testimony of T. A. Noble.)

Q. You never had any agreement with the Sunny-side, did you?

A. I know the United States purchased the Sunny-side canal in order to avoid that difficulty. That purchase was made as a point in the settlement of the water right question in this valley.

Q. That was arbitrarily fixed at 650 second-feet.

A. That was the amount determined at that time.

Q. And the amount to go to the Indian country over there, the Wapato unit, was arbitrarily fixed at 147 feet.

A. Yes. But that was the amount actually diverted at that time.

Q. Yes; that is to say, after somebody had cut away the dam there that was turning water into the Indians canal, in August, 1905, when there was the least flow in the [152] Yakima river, you measured and found only 147 second-feet running into the Indians canal.

Mr. BURR.—I object to that question; it is immaterial to this question entirely. There is no use putting in a long record concerning this entire water right of the valley in connection with this defendant's water right.

Q. Now you may answer that question. The measurement was taken in August, 1905, was it not?

A. I don't recall. There was a measurement made in 1905 and 1904.

Q. Now you may answer the first question.  
(Question read.)

A. There were two Indian canals and that was

(Testimony of T. A. Noble.)

the total measurement during the low water season of those two canals.

Q. You recall the matter of the litigation over the water rights in 1905, don't you, Mr. Noble, brought by the Prosser Falls Land & Power company?      A. Yes, sir, such litigation was started.

Q. When did the Government commence construction work under this Yakima Project—after you left the Service or before?

A. It was started after I left the Service.

Q. When did it commence, do you know?

A. Well, I couldn't state definitely.

Q. Where was the first work done, so to speak?

A. I believe the first construction work was on the Tieton Project and in the construction of roads. I think that was probably some time during the late summer of 1906.

Q. The fact is, after these agreements were signed in order for the Government to come into the Yakima valley, [153] the Government had to take over the Sunnyside canal?      A. Yes, sir.

Q. You had to reduce the amount of water going into the Indians canal to 147 second-feet to come within the rule, didn't you? It had to be that low, didn't it?

A. Well, the general plan was, so far as all the appropriators were concerned, that taken as a whole they should confine themselves to the amount actually diverted prior to the time the work was actually begun. Now, if any one signed for more than he had



(Testimony of T. A. Noble.)

actually diverted some one would have to sign for less.

Q. Yes, I understand that. But in the summer of 1905 the Indian canals were only taking 147 cubic feet.

A. That was it, yes, sir, approximately, as near as—

Q. The whole purpose of everything you did that year in taking over this Sunnyside project was to commence work on the Tieton unit, was it not? That was to be the initial work, was it not?

A. That was decided, I believe, to be the first work undertaken.

Redirect Examination.

Q. (Mr. BURR.) Had they decided to undertake this work before the agreements were all in, Mr. Noble?

A. I think not, no, sir. As I said, during 1906 I was nearly all the time either working on the Priest Rapids project or the final surveys of the Tieton Project, and I had very little to do with the negotiations leading up to the final settlement of those water rights, [154] which occurred, I believe, along in the latter part of 1905 or fore part of 1906, and just when each one of them was signed I could not state. I became somewhat familiar with it as a water-master; that is, I made a record of it as water-master, but I do not know now when those dates occurred.

Q. (Mr. GARRECHT.) Mr. Noble, did the Sunnyside company sign up any of those agreements?

(Testimony of T. A. Noble.)

A. You mean the Washington Irrigation Company?

Q. Whatever it was—this Sunnyside project.

A. The Washington Irrigation company did not. That company did not sign any agreement at all as far as I know. They sold their canal to the United States.

Q. And at the time these other water users on this stream were signing those agreements did you have any option for the purchase of this Sunnyside canal?

A. I did, yes, sir, through Mr. Blaine.

Q. For the Government, you mean?

A. For the Government. That deal was first negotiated in Olympia in the spring of 1905.

Q. Did you ever tell any of the officials of the West Side Irrigating Company that if they needed any more water than they limited themselves to by the agreement with the Government, that the Government would be furnishing it?

A. I have no recollection of doing anything of the kind.

Q. Did you ever tell any of the members of that company that they would have to, or demand of them that they buy stored water?

[155] A. Why, I don't recall that I did. I do not think it is hardly possible that I could have made such a statement for the reason that the Government at that time did not have, or at least we did not have, any authority, nor the Secretary of the Interior, nor Congress, had not given us any authority to sell water from those reservoirs.

(Testimony of T. A. Noble.)

Q. Was the Government any more anxious to undertake this project than these people, the waters users along these streams, were anxious to have the Government go into it?

A. There seemed to be great anxiety all up and down the valley to have the Government come in here, and it was on the strength of that desire on the part of the people that induced us to go in.

Mr. GRAVES.—Of course I object to all this so far as being immaterial and incompetent.

Q. And how was it with the West Side Irrigating Company people; was anything done or said to indicate how they felt about it?

A. Why, I don't recall just what was said about that. I know we had a good deal of talk about the construction of the High Line canal, and I know, too, that I was asked that if these agreements were signed if the Government would undertake the construction of that project, and I know, also, that I did not make any direct or definite promises that the Government would do so. I did state that I had made a preliminary investigation of the project and that it was feasible, but that it, however, was a larger project, that is, took more money [156] than there was available in the reclamation fund at that time, and that whether it would be constructed in the future would depend upon its feasibility as determined by the board of engineers or the chief engineer. I think that is, in substance, the answer I gave to that query.

Q. (Mr. GRAVES.) Mr. Noble, since we have gone into that matter of the people being anxious,

(Testimony of T. A. Noble.)

from whom did you get instructions to proceed in the matter of initiating this Yakima Project—from whom did your instructions come?      A. From Mr. Newell.

Q. As the director of the Reclamation Service?

A. He was chief engineer then.

Q. And he directed you to start in and get this project in shape?      A. The first move, Mr. Graves—

Q. I am saying he directed you; didn't he?

A. If you desire me to tell the actual facts regarding the beginning of this thing I will do so.

Q. If you fully know "the actual facts" I suppose you know the political inside of the whole thing, don't you?

A. There was no political inside connected with it as far as I am concerned.

Q. You asked me if I desired to know the actual facts, but if you do not know them I am not going to probe you about them.

A. I do know them, and if you desire me to I will tell you.

[157] Q. You know very well it was the influence of Senator Jones at Washington that started the Teiton Project, near North Yakima, don't you?

Mr. BURR.—I object to the question.

A. I don't know anything of the kind.

Q. All right; you say you don't know anything about it.      A. I don't believe that was so.

Q. You got your directions directly from Mr. Newell?

A. Yes, sir. I was on the board of engineers at the time.



(Testimony of T. A. Noble.)

Q. And the moment you got your instructions from Mr. Newell you started on a campaign up and down the valley making speeches to these people, didn't you? A. I did.

Q. (Mr. GARRECHT.) As counsel will not let you state how this started, I wish you would state exactly how that started, Mr. Noble.

A. The engineers of the Reclamation Service had determined that the Palouse Project was not favorable for the Government to undertake, at least at that time, and there was serious question as to whether there was any project in this State which could be undertaken. In the winter of 1903 I went to Portland where Mr. Newell was at that time, for the purpose of getting his consent to undertake a preliminary survey of the water conditions of the Yakima valley for the purpose of getting the water question settled here, and he gave his consent, and I sent Mr. Bliss and Mr. Harley over here for that purpose, and in 1905 we started these investigations as to the feasibility of all these projects. The [158] board of engineers, consisting of myself and Mr. Henny and Mr. Wiley and, I think, Mr. Quintin, sat here in North Yakima to determine which one of these projects it was feasible to undertake, and it was decided at that board meeting that we must purchase the Sunnyside canal and that there was not sufficient funds to undertake the Kittitas Project, which was known as the High Line Project at that time, and for those reasons I know, as far as those engineers were concerned and

(Testimony of T. A. Noble.)

myself, that that is why the Tieton Project was approved.

Q. (Mr. GRAVES.) Who called that board together? Who caused that board of engineers that you spoke of to meet?

A. The director and chief engineer of the Reclamation Service.

Q. At Washington?

A. At Washington, yes, sir.

Q. In other words, you followed in all of these matters instructions from Washington, didn't you?

A. Yes.

Q. You had no power yourself to do it?

A. Oh, no, not to decide these matters at all, except as being a member of this board of engineers.

(Witness excused.)

**Testimony of William C. Muldrow, for Plaintiff (in Rebuttal).**

[159] WILLIAM C. MULDROW, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. BURR.) What is your business?

A. Civil and hydraulic engineer.

Q. How long have you followed that?

A. All my life; about 12 or 13 years in active practice.

Q. Mr. Muldrow, were you taking measurements or reporting to the Geological Survey in 1905 in the Yakima Valley?      A. I was.

Q. Will you state whether this photostatic copy

(Testimony of William C. Muldrow.)

which I offer you, appearing upon the third of those attached sheets, is a photographic reproduction of your handwriting, signature and figures.      A. It is.

Q. When was that taken, Mr. Muldrow?

A. On August 29, 1905.

Q. What was it?

A. It was a gaging, current meter gaging, of the West Side or West Kittitas canal.

Q. What results were arrived at as a result of that gaging?

A. The results of this gaging show that on that date, at the gaging station just above the town of Thorp, with the gage standing at 2.55 feet, the canal discharged 73.7 second-feet of water—there was that amount flowing in the canal.

Q. Will you recite particularly the method of obtaining daily discharges into the West Side Irrigating Company's canal as a result of that gaging?

A. This gaging is a part of the process necessary to obtain a season's record. Do you wish me to—

[160] Mr. BURR.—I wish to state for the benefit of counsel, we will put on the stand the observer who took these daily gagings and made the readings. This witness did not take the gagings himself, we will prove them by other witnesses.

A. (Continued.) The object of course is to have a complete record of the amount of water flowing in the stream under consideration throughout whatever period is desired. Here we wanted the flow in this irrigation canal from the time it was turned on in the spring until it was turned off in the fall.

(Testimony of William C. Muldrow.)

Q. How were those objects obtained, Mr. Muldrow?

A. Reading stations were selected as near the head of the ditch as was practicable to get a section that would admit of accurate determination. Such section was—

Mr. GRAVES.—I think I shall object to this if there is no showing by the witness as to where they were actually placed. I object to any statement in general terms as to what they desired to do, and insist that the exact location and the actual readings be shown by the man who made the observations.

A. (Continued.) Well, it was my duty to obtain the data as a whole; this measurement is one step in the process. I had charge of maintaining that station and supervising the observer and of receiving his daily reports, copying them into records and—

Mr. GRAVES.—Let me ask him just one question: What you got was the report made to you and then you made up the results from the report of the observer; is that correct?

A. From his reports and my own observation. When I made [161] the actual gagings I checked his reading for that day.

Q. (Mr. BURR.) Now, irrespective of the observations, which we will prove by another witness, taken in connection with the gagings which you have there, how were the results reached in terms of daily discharge into that canal?

A. Taking these observations I have here in connection with other observations of the same kind,



(Testimony of William C. Muldrow.)

made during the same season, and all being made carefully and accurately with standard instruments whose accuracy is investigated from time to time, we plat these actual determinations on cross-section paper, check them up and arrive at the rating table or curve which will show the amount of water flowing at any given height on the gage; then taking the observer's daily records, the accuracy of which is checked up by myself in this case whenever I go there, several times during the season, we tabulate those results and sum them up.

Q. Now using that as your custom, was that followed with regard to the 1905 figures?

A. Absolutely.

Q. By yourself?      A. By myself.

Q. And by the observer?      A. Yes, sir.

Q. How much variation of error or how large a proportion of error is there in connection with those figures?

A. There are several sources of possible error. All of them, except one, would be what we term—

Q. (Mr. GRAVES.) Well, there is not any great error, is [162] there?      A. No.

Q. How much? That is what counsel wants to get.

A. The error is probably one or two per cent; if it exceeds three per cent it is easily detected.

Q. (Mr. BURR.) In connection with this actual work, in June, 1905, was that done with the kind of appliances that you refer to as being scientific?

A. It was.

(Testimony of William C. Muldrow.)

Q. Done with a current meter, in part?

A. Yes.

Cross-examination.

Q. (Mr. GRAVES.) Where was your meter, Mr. Muldrow, at what point?

A. At what point in the section, do you mean?

Q. On the West Side, yes.

A. In this particular case I think that my notes show that I divided up the canal, which was fifteen feet wide, into six sections and I took two observations at each of two points in each section.

Q. Which was the nearest section to the intake—at what particular point? Was it the flume?

A. You mean the gaging station?

Q. Yes. At what particular point was the gaging station?

A. The gaging station was at the road crossing, about a mile above the town of Thorp and about a mile and a half from the head of the ditch.

[163] Q. That was in the flume?

A. No, it was in earth section.

Q. It was not in a flume? A. No.

Redirect Examination.

Q. (Mr. GARRECHT.) Mr. Muldrow, you are not now in the service of the Government, are you?

A. No.

Q. When did you sever your connection with the Government? A. In 1909.

Q. And since that time you have not been employed by the Government in any way? A. No.

(Witness excused.)

**Testimony of Margaret Lechman, for Plaintiff (in Rebuttal).**

[164] MARGARET LECHMAN, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. BURR.) Miss Lechman, where were you living in 1904 and 1905?

A. At Thorp, Washington.

Q. On what ranch were you living at that time?

A. The Lechman ranch.

Q. Did you take some observations upon the West Side Irrigating Company's canal? A. I did.

Q. Will you state whether that is your handwriting there (pointing at the figures and writing shown as by Maggie Lackman)? A. Yes.

Mr. BURR.—I offer the document in evidence.

Document referred to offered in evidence, marked as Plaintiff's Exhibit "K" and returned and filed herewith.

Q. Occasionally your family spelled their name two different ways, did they?

A. No, they did not, but in going to school the teachers always spelled it that way and I got to signing it that way, but L-e-e-h-m-a-n is correct and it is used by the folks all the time.

Q. Now, Miss Lechman, when you took these observations you may state whether or not they were always taken with care. A. I did.

Q. Were they taken on the exact date that they show in the report they were taken on?

A. Yes, sir, they were.

(Testimony of Margaret Lechman.)

[165] Q. Do you or do you not think it was possible for you to read the rod as close as the report shows it was read?      A. It was, yes, sir.

Cross-examination.

Q. (Mr. GRAVES.) How did you come to take these readings?

A. Why, my brother was taking the ditch markings and when he didn't have time I would take them for him.

Q. All you know about it is what he told you?

A. Yes, he showed me, and many times he would go after me to see if I did take them right.

Q. Where was this gauging station?

A. It was right there on our place.

Q. Yes, but to get it a little more definitely, how far was it from Thorp?      A. A mile.

Q. Directly west of Thorp at that bridge?

A. At that bridge.

Q. You know nothing about the condition of the ditch near there, do you?      A. I don't understand.

Q. Do you know about it beginning to be pretty full of mud just above there? Don't you recall that in 1905 it caved in?      A. I couldn't say for sure.

Q. You don't recall that definitely?      A. No.

(Witness excused.)

**Testimony of Thomas Lechman, for Plaintiff (in Rebuttal).**

[166] THOMAS LECHMAN, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:



(Testimony of Thomas Lechman.)

Q. (Mr. BURR.) What is your business, Mr. Lechman?     A. Ranching.

Q. How long have you been ranching?

A. 14 years.

Q. How long have you ranched at the Lechman ranch, in Kittitas valley, near the West Side Irrigating company's canal?     A. About 10 years.

Q. When did you go there?

A. Well, about 14 years this month since I come in there.

Q. Do you recall an enlargement of the West Side Irrigating company's canal after the Milwaukee railroad went through, or after its grading?

A. Yes, sir.

Mr. GRAVES.—I object to counsel's using the word "enlargement" in asking these questions.

Q. At the time the improvement referred to was put through was that or was that not an enlargement of the West Side Irrigating company's canal?

A. You mean how much larger?

Q. Yes.

A. Well, I couldn't say exactly. It looks to me about two feet.

Q. Two feet on the bottom width?     A. Yes.

Q. Was that all the way through your place, Mr. Lechman?

A. Yes. About two feet on the bottom.

Q. Did they deepen it? [167]     A. Yes.

Q. How much?

A. Well, I don't know; I couldn't say for sure; it looks to me like about seven or eight inches.

(Testimony of Thomas Lechman.)

Q. All the way along through your place?

A. Yes.

Q. Did they do the same work on the ditch in the other localities near you?

A. Well, I don't know. They been working, I don't know what they done.

Q. Did they do that down through Page's place?

A. No.

Q. Did they do that up above you?      A. Yes.

Q. How far would you suppose, that you actually observed yourself?

A. Well, I don't know; it was about two miles, I guess. I don't know exactly how far because I never went there. I know over there on my place, but I don't know—

Q. That was not merely a clearing out of old slides, was it, Mr. Lechman?      A. What's that?

Q. That wasn't just merely that they cleared out old slides into the ditch; that was an enlargement clear through, was it?

A. Yes, they went right through.

Q. Made it bigger than it ever was before?

A. Yes.

Mr. GRAVES.—Let him state what they did.

Q. After they got through with this ditch was the ditch [168] able to carry more water than it had been able to carry before or less?

A. Well, I guess it carried more water. I don't know how much.

Q. Are you sure it carried more water?

A. It bound to, they made it bigger.

(Testimony of Thomas Lechman.)

Q. Would it carry more water after they got through, I mean, than it ever carried before?

A. Well, I don't know. I never measured water, of course.

Q. Is it your opinion that it did or not?

A. Well, I believe it carried more water or else they wouldn't fix it. I don't know if they put more water in or not.

Cross-examination.

Q. (Mr. GRAVES.) These flumes measured about the amount of water that ditch would carry, as a regular thing, didn't they? A. Yes.

Q. The flumes, I say, that were along the canal, they would measure about the amount of water the ditch would carry?

A. You mean right where it was measured?

Q. No, the different flumes. You know where the different flumes were.

A. Well, I don't know. I never been through.

Q. Did you ever see the Gordon flume?

[169] A. No.

Q. Ever see the flume at Yearwood's place?

A. No, I never seen the flume there.

Q. Never saw the Ellison flume?

A. No, only the flume at my place. That was widened up.

Q. There at your place for a little bit, to keep the dirt from sliding, they pressed the dirt into the bank, didn't they? A. Put it right down in the bank.

Q. Put it right down there to keep it from sliding?

A. Yes.

(Testimony of Thomas Lechman.)

Q. This work that you refer to, Mr. Lechman, as having been done at your field, that was done in 1909, was it not?

A. Well, I can't say for sure, only I know it was after the Milwaukee went through.

Q. What year did the Milwaukee go through?

A. I don't know.

(Witness excused.)

Mr. GARRECHT.—We will offer in evidence this certified copy of a contract and two mortgages by the trustees of the West Side Irrigating Company to show that they were engaged in making contracts of a similar nature.

Mr. GRAVES.—The two mortgages I do not object to, but I object to the contract or agreement with C. A. Splawn being received in evidence in as much as that agreement was made and entered into for the purpose of settling differences between the company and other parties long prior to any interest the United States had.

[170] Agreement referred to offered in evidence and marked Plaintiff's Exhibit "L"; mortgage from company to The Barnes and McCandless Company marked Plaintiff's Exhibit "M"; mortgage from company to William Brown marked Plaintiff's Exhibit "N," and all returned and filed herewith.

Mr. BURR.—I will offer and read in evidence from the record of the stockholders' meeting of the West Side Irrigating Company, which shows, under date of April 1, 1905, the following:

"Motion by W. A. Stevens, seconded by J. N.



(Testimony of Thomas Lechman.)

Burch, that the stockholders of the West Side Irrigating Co. make claim to the Government Reclamation Bureau to four thousand inches of the waters of the Yakima River, and the Board of Trustees to notify Splawn and Ellison to make their claim to water to flow through the company's canal, and in case they do not make their claim the Board of Trustees to claim a thousand inches for Splawn and Ellison. Carried."

I would like to have the record show, also, that the words "four thousand" is a change, the original record appearing "thirty-five hundred."

Mr. GRAVES.—No. It may show that "thirty-five hundred" is erased and "four thousand" written in, but not that there is a change in the record, because we will show that the record before it was approved was as it reads there, "four thousand" and not "thirty-five hundred."

Mr. GARRECHT.—We will offer it with your explanation.

Mr. GRAVES.—I will concede that the testimony of George F. Harley would be the same as to plaintiff's proposed exhibit "O," and that the testimony of W. J. Lightfoot with regard to the first and second photographic sheets of Plaintiff's Exhibit "J" would be the same, as Mr. Muldrow's testimony has been with regard to the third sheet of the said exhibit "J."

[171] Mr. BURR.—Pursuant to that admission we will not offer in evidence certified photographic

(Testimony of Thomas Lechman.)

copy of gaugings made by George F. Harley of the West Side canal.

Document referred to offered in evidence, marked as Plaintiff's Exhibit "O" and returned and filed herewith.

Mr. BURR.—We have no other witnesses here at this time, we will only have about two more, and I suggest that you proceed with your surrebuttal at this time, if that is agreeable to you, and we will call our witnesses when they come.

Mr. GRAVES.—Yes, I have some testimony that I can put in at this time.

**Testimony of Carroll B. Graves, for Defendant (in Surrebuttal).**

[172] CARROLL B. GRAVES, produced as a witness for defendant, on surrebuttal, having been first cautioned and duly sworn, testified:

The matter that I am going to testify to will not be contradicted and might well go in as a stipulation. If it is contradicted I shall withdraw my testimony upon the point.

The Wapato Unit of the Yakima Project; there is no bill pending in the Congress for the appropriation of money to build canals and furnish water to the Yakima Indian Reservation; there was a recommendation by a committee appointed by the Congress that that be done, and Congress, in August, 1914, appropriated one hundred thousand dollars for that purpose, but at this last session of the Congress, ending on March 4th, there was no appropriation made for it.

(Testimony of Carrol B. Graves.)

There was a contract between the United States and the Kittitas Reclamation District by which the District was to pay the Government twelve dollars and sixty cents per acre for water to irrigate the lands within that district, that amount being assumed to be the actual cost of the storage of water for that purpose. That contract has expired by limitation of time and is not now in existence; it may or may not be renewed, depending upon the abilities of the District in the future.

I am acquainted with the Yakima Project as a whole. The only works now being carried on by the Government in the way of irrigation is through its Tieton Unit and Sunnyside Unit.

You may cross-examine.

[173] Cross-examination.

Q. (Mr. BURR.) You are familiar with the provision for the irrigation of portions of the Wapato Unit within the Yakima Indian Reservation recently made by the Congress, are you not?

A. What do you mean by "recently made"?

Q. Made by Act of Congress as part of the Indian Appropriation Bill passed by the last Congress.

A. In August, 1914?

Q. Yes. A. Yes.

Q. Do you recall what tracts of land are proposed to be irrigated under that provision so made?

A. Yes. They follow the recommendation of the commission.

Q. What are they?

(Testimony of Carrol B. Graves.)

A. That substantially 120,000 acres to be taken care of. But for that work the Congress only recommended that six hundred and thirty-five thousand dollars be appropriated in payment for water.

Q. It was the theory, was it not, that free water was being furnished for 40 acres of each Indian's allotment?

A. One-half of each allotment, whatever the acreage might be.

Q. The provision, then, that was made by the appropriation so initiated, not all actually appropriated at the time, was for the irrigation of a portion of each allotment scattered over the entire area—was it or was it not?

A. The assumption, Mr. Burr.

Q. The supposition was that the other portions of these [174] allotments were or were not to be irrigated eventually?

A. They were to be irrigated.

Q. The entire area was to be irrigated?

A. That was the theory. I might say we have abandoned it now, like most of these other things. We know that the Government will not come through with it in time, and the theory down there now is, I might say, to have the irrigation proceed under other agencies than the Government agencies, if we can do it. That is to say, Mr. Burr, when Congress only appropriated one hundred thousand dollars last year and when they refused to make any appropriation this year, the people holding lands under the Wapato Unit lost faith in ever getting their lands irrigated



(Testimony of Carrol B. Graves.)

through that source—it would be too far in the indefinite future.

Q. Would they purpose putting in their own storage works?     A. Oh, no, buy it, sure.

Q. They would continue to look to the Government for their supply??

A. As long as the Government occupies the field, yes.

Q. The Kittitas Reclamation District is an existing organization, is it?     A. Oh, yes.

Q. It remains in existence for what purpose?

A. To get water from the Government whenever we pay them for it; they won't furnish it to us until we can.

Mr. BURR.—That is all.

[175] Redirect Examination.

The point that I was making in my testimony—I have to re-examine myself a little bit, Mr. Burr—was that the works inaugurated by the Government in 1905, speaking of the stipulation there in which it is stated that many millions of dollars were appropriated for this purpose, that after the work which they attempted to undertake they put in operation only the Tieton to the extent—

Mr. BURR.—I object to this; it is in contradiction of the stipulation we entered into.

I am not contradicting it, because the contract with the Kittitas Reclamation District was in existence when we made the stipulation—that the work which

(Testimony of Lewis F. Ellison.)

the Government assumed to undertake put in operation only the Tieton and the Sunnyside.

(Witness excused.)

**Testimony of Lewis F. Ellison, for Defendant (in Surrebuttal).**

[176] LEWIS F. ELLISON, produced as a witness for the defendant, on surrebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. GRAVES.) Mr. Ellison, where do you reside?

A. At Thorpe, Kittitas County, Washington.

Q. How long have you resided in that community?

A. About thirty-five years.

Q. What is your business, generally speaking?

A. Farming and milling as a general business.

Q. You have done some civil engineering and contracting?

A. Yes, sir.

Q. Are you acquainted with the West Side Irrigating Company's canal?

A. Yes, sir.

Q. When did you first have anything to do with that canal?

A. In 1889, in the beginning of the construction of the canal.

Q. What did you do in 1889 in connection with it?

A. I had a contract with Mr. Sharp and Mr. Stevens, the manager and secretary of the company at the beginning of the organization, to construct flumes and bridges all the way through the lands ditched.

Q. In what ways were those flumes constructed?

A. The flumes were known by numbers; com-

(Testimony of Lewis F. Ellison.)

mencing at the head, that is, the first flume below the head gate was in number one, the next one number two, and so forth on down. Number 1 was put in of timber 18 feet, but the flume was 16 feet less two inches on each side—two planks on each side; that would make it 15 feet 8 inches of flume.

Q. (Mr. GARRECHT.) Was this contract in writing?

[177] A. Yes, sir. I have a copy of the contract.

Q. Will you let me look at it?

A. (Producing a document.) That is a copy of the original contract.

Q. (Mr. GRAVES.) Now, you gave the dimensions of number 1? A. Yes, sir.

Q. Is that what is known as the Gordon flume?

A. It is the Gordon flume, yes, sir.

Q. What was the next flume, Mr. Ellison?

A. The next flume is in Mr. Hutchinson's field.

Q. Number 2? A. Yes.

Q. Can you give the dimensions of that flume?

A. That was 2 feet less; that was 14 feet minus a 2-inch plank on each side again.

Q. Go right along down the ditch.

A. The next flume was what we called the Pardee flume, a short distance below. That was the same size.

Q. (Mr. BURR.) That was the same size under that contract you mean.

A. That was built the same size the time I put it in, yes.

Q. That was not done under the contract, was it?

(Testimony of Lewis F. Ellison.)

A. Yes, that was under the contract.

Q. The contract does not call for a flume of that dimensions or any other dimensions, does it?

Mr. GRAVES.—I am asking him what size he built them.

Q. (Mr. GRAVES.) You built those flumes under the contract with the company?

A. Yes, I built those flumes under contract.

Q. And you are giving the size you built them?

[178] A. The contract did not specify the size of the flume, but the contract specified that I should build them according to the instructions of the engineer in charge.

Q. Now go on to number 3.

A. That was number 3, at Yearwood's place.

Q. And the next flume?

A. Is in Mrs. Ellison's field.

Q. Just go on down. How many did you put in?

A. There was a crossing under the county road, but it was not called a flume, it was an underground crossing, but I marked it "flume" at that time. There is no flume there at the present time, nothing but the bridge; we made a flume and the road went over and that was changed into a bridge, but that would make no change in operation. The next number then would be number 5 at Packwood's place, now known as the Packwood place. There the flume was changed, the same size of flume on each side and then an offset put in on each side, making the flumes smaller as we went down.

Q. That is, as you went down towards the end of



(Testimony of Lewis F. Ellison.)

the canal you reduced the flumes in size?

A. Reduced the flumes in size.

Q. Have you any acquaintance with those flumes in later years, Mr. Ellison?     A. Yes.

Q. When?

A. I had a contract in 1904 in placing one in Hutchinson's field—1904, I think.

Q. What have you to say as to the size of the flumes in 1904 as compared with the way they were in 1889?

[179]     A. They were the same size.

Q. Are they the same size now?

A. They are the same size now.

Q. The carrying capacity and intake of that canal was the same in 1889 as it was in 1909?

A. Well, the flumes are the same.

Q. Did you have anything to do with changes at the headgate or intake in 1909, Mr. Ellison?

A. I had charge, as engineer in charge, of all that work in the new intake.

Q. Now, tell us what was done.

A. There was 1025 feet of new ditch made to intersect the old ditch below the new headgate, tapping the river farther up in order to make a permanently good place for the intake to begin the work.

Q. Was the carrying capacity of the ditch enlarged by that work?

A. No, sir; that is, not below that. That work was done to draw water in a more uniform body. Before, when the river was very low, it required a great deal of work in the river to make a dam suffi-

(Testimony of Lewis F. Ellison.)

cient to bring water in in the low time in the river, when the water was low.

Cross-examination.

Q. (Mr. BURR.) Did I understand you to say, Mr. Ellison, that the work that was done in 1908 to 1909 did not enlarge the capacity of the ditch at all?

A. The new work at the upper end?

Q. Yes, any of it.

[180] A. No. That was made to be the same size as the old.

Q. Well, at the intake? A. Yes.

Q. Well, down below they enlarged it, didn't they?

A. No, I couldn't say they enlarged it.

Q. They increased the carrying capacity of that canal?

A. They increased by taking out the high places. As I stated to you once before, I think, there was some high points that we had to take out. I ran a level over from the head to the low end and found two points very high and found several points that was 4.5 high, and those points we moved. Most of the high points were from caves and sediment in the ditch, but there was two prominent high points that we removed that had never been removed before.

Q. Where were those points?

A. One was in Mr. Hawn's field and the other was close to the tunnel, just below the tunnel at the intake, about a mile—somewhere about a mile from the intake, close to the Gordon flume, the first flume and the cut nearest to the Northern Pacific Railroad's track.

(Testimony of Lewis F. Ellison.)

Q. Do you recall when the Milwaukee did its grading through there?     A. Yes, sir.

Q. What year was that?

A. I could hardly tell you the year because I haven't thought anything about it. 1903 or 1904, somewhere along there; I couldn't tell you just when; no, it was later than that.

Mr. GRAVES.—1906 or 1907, I think.

[181] A. (Continued.) Well, I furnished the Milwaukee a good deal of lumber that year, but I haven't my books and just couldn't tell you the date, but it was 1906 and 1907, I think, along there, when they commenced construction first. I could look up the records and tell positively.

Q. Now, Mr. Ellison, the four thousand inches, was not that the diversion figure?

A. The four thousand inches in the canal?

Q. The four thousand inches in the canal, yes, sir.

A. I never made any accurate measurement myself of the amount of water.

Q. Was not that your understanding?

A. Yes, that was my understanding of it—four thousand inches.

Q. At diversion point?

A. Yes. That was my understanding at the beginning of the canal, when it was first built, that it was to carry that much water.

Redirect Examination.

Q. (Mr. GRAVES.) That was just your understanding from what you had heard somebody say?

(Testimony of Lewis F. Ellison.)

A. Yes.

Q. You never made any measurements?

A. I never made any measurements.

Q. So as to know how much water they were to divert or how much they were applying to use?

A. Yes, I never made any measurements.

[182] Q. Whatever the carrying capacity of the flumes was when they were constructed in 1889, it is the same now?

A. Yes, the same as they are now.

Q. So, if the Government measurement should show that they carried 102 to 104 second-feet, the canal was able to carry that amount in 1889?

A. The same as in 1889, yes.

Q. (Mr. BURR.) What was the pressure, Mr. Ellison, four or six inch pressure?

A. Well, I never took any notice to the measuring-box; I never paid any attention to that at all.

Q. What was understood to be the measurement?

Mr. GRAVES.—I object to anything that was understood or to his stating any opinion or impression, unless he had some knowledge.

Mr. BURR.—This witness was a civil engineer for the company at the time, and one of the oldest stockholders, I think he said, in the company.

The WITNESS.—No, sir.

Mr. GRAVES.—Oh, no; never was a stockholder and never used water out of the ditch.

Q. You have used water out of this ditch, haven't you, Mr. Ellison?

A. Not until the last two years. I never used any



(Testimony of Lewis F. Ellison.)

water out of the ditch except the reserved water I had from the Ellison-Splawn ditch. That was reserved, you remember.

Q. You have been getting water through this ditch since 1889, haven't you?

A. I got water through this ditch back to 1882. You remember [183] that was when my appropriation was made—in 1882.

Q. What was the custom of the country in regard to how many inches of pressure there was in a miner's inch, 4 or 6 inch pressure?

A. It was different. In the Toneum ditch there was a 4-inch pressure, in the Snyder there was a 2-inch pressure, in the Umptanum there was a 6-inch pressure above the opening or orifice and that was an inch orifice or opening and that made 6-inch pressure, miner's inches, or made 7 inches to the bottom of the box again—measured different ways—but that, at the beginning, I think, was a 4-inch pressure.

Q. In the West Side Irrigating Company's ditch?

Mr. GRAVES.—I object to all this testimony as immaterial. It does not go to show what measurement was used for the West Side.

Q. What measurement did they use in the West Side?

A. What I am speaking about is the Toneum ditch pressure, and I don't know that the West Side used that same pressure or not.

Q. How did they measure you your water in the Splawn-Ellison lateral?

A. We never measured it.

(Testimony of Lewis F. Ellison.)

Q. Had no box there for that ditch?

A. Had no box. Under our contract they furnished water to the amount of water that was necessary up to the amount of 500 inches.

Q. Up to the amount of 500 inches for the two?

A. Yes.

Q. Do you know the pressure that was used in the Manashtash [184] country that you testified to here?      A. No.

Q. There are various units in the measurement of the inch used in that locality, are there not?

A. There is two ways, the 6-inch and the 4-inch, anyway, I think.

Q. Well, they use different orifices, too, do they not?

A. Well, I think they do. I am not positive about that, whether they use the same orifice or not.

(Witness excused.)

And thereupon a recess was taken till 2 o'clock P. M. the same day.

### [185] SECOND HEARING.

#### FIRST DAY—AFTERNOON SESSION.

North Yakima, 2 P. M., March 22, 1915.

PRESENT—The same as at the morning session.

Continuation of proceedings pursuant to recess as follows, to wit:

Mr. GRAVES.—Defendant offers in evidence the minutes of the special meeting of the stockholders of the defendant corporation, held January 2, 1906, and by stipulation the following is read into the record:

“Motion by W. A. Stevens and second by Good-

win, that no action be taken to relinquish any water at the present time. Carried unanimously.”

Mr. GRAVES.—Defendant offers in evidence minutes of called stockholders’ meeting, held Thursday, December 21, 1905, and by stipulation I will read into the record the following:

“Ellensburg, Washington, Thursday,  
December 21, 1905.

At a called meeting of the stockholders of The West Side Irrigating Company, a majority of the stockholders present and represented being a majority of the entire stock were present, with W. T. Sheldon in the chair, and trustees H. J. McCauley, W. A. Stevens and Mitchell Stevens also present, Mitchell Stevens was chosen by the Board of Trustees to act as secretary pro tem.

It was regularly moved and seconded that a called meeting be held on January 2, 1906, to discuss the feasibility of entering into contractual relations with the Government in the matter of a general agreement with the Government and with other water users of the Yakima river.

After a general discussion in which the [186] sense of the meeting was found to be against any concession of our water rights, motion was carried unanimously.”

Mr. BURR.—I would like to read into the record the following from the minutes of Trustees of the defendant corporation:

“Ellensburg, August 23, 1902.

Special meeting of the W. S. I. Co. called to order by President J. O. Gibson. By request of President,

J. P. Sharp acted as chairman pro tem and stated the object of the meeting, which was to consider ways and means of enlarging the ditch.

Motion by W. A. Stevens that the capital stock of The W. S. I. Co. be increased from \$30,000 to \$40,000. Motion carried.

Motion by Packwood that the trustees be empowered and instructed to employ a competent engineer to improve ditch and estimate cost of making ditch large enough to carry 3,500 inches of water. Motion carried.

Motion by Packwood that the president and secretary be instructed to call a special meeting for the purpose of changing by-laws empowering trustees to borrow money to the amount of \$11,000 instead of \$5,000 as at present. Motion carried."

And thereupon an adjournment was taken to 10 o'clock to-morrow morning.

### [187] SECOND HEARING.

#### SECOND DAY, FORENOON SESSION.

North Yakima, 10 A. M., March 23, 1915.

PRESENT—The same as at former hearings.

Continuation of proceedings pursuant to adjournment as follows, to wit:

#### **Testimony of F. J. Page, for Plaintiff (in Rebuttal).**

F. J. PAGE, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. GARRECHT.) What is your name?

A. F. J. Page.

Q. Where do you live, Mr. Page?



(Testimony of F. J. Page.)

A. Two miles south of Thorp.

Q. You live on this *Wide Side* irrigating canal?

A. Yes, sir.

Q. How long have you lived over there?

A. About 25 years.

Q. You have been there ever since this canal was established?     A. Yes, sir.

Q. Does that canal run through your place?

A. It does.

Q. About how many feet or rods does it run through your place?

A. I think it is 114 rods, if I am not mistaken.

Q. At any time since this ditch was established was there any work done through your place?

A. Yes, sir.

Q. Do you recollect about what years?

A. No, I do not.

[188] Q. Have you any way of fixing the time approximately?

A. Why, it was when Sharp, Coleman & Bradshaw had the contract for enlarging the ditch, but I couldn't give the date at all.

Q. What did they do with reference to enlarging the ditch through your place?

A. Take it on the east line, there was an enlargement there of something like three rods long, that is, running northwest.

Q. Now, were there any enlargements made after that time?

A. Well, it was after that time that I was speaking of now.

(Testimony of F. J. Page.)

Q. You are speaking of the last time it was enlarged?      A. Yes.

Q. I don't think I have that quite clear in my mind. Do you mean this was a time after the first enlargement made by Sharp? You said something about an enlargement being made by Sharp & Company there.

A. Why, they enlarged the ditch the whole length of it; I don't know as they enlarged it, but worked on it—enlarged it in places.

Q. Now, was it after that that they enlarged some 30 or 40 roads?

A. Yes, it was some little time after that.

Q. A year or so?

A. Why, it seems to me it was something like a couple of years, but I couldn't call the date.

Q. Could you approximate the time the railroad went through there?      A. No, sir.

Q. You have not any way of fixing the date?

[189]      A. No.

Q. But you do know it was after Sharp and Coleman went through there?      A. Yes, sir.

Q. What work was done there at your place at that time?

A. The bank was weak there through my place, and they commenced at the upper side and then went back into the bank, something like 7 feet, and put it against the lower bank. They practically made no difference at the upper end of my place, but down there close to my buildings they made it a little wider, where it goes into the county road there.

(Testimony of F. J. Page.)

Q. Well, would the ditch or would it not carry more water after they got through working there than it would before?

A. Yes, it would carry more water. The upper side, there was no difference in that. The ditch makes a turn there where it goes through the county road, it was kind of jogged there and that held the water in there and they had it enlarged in that place to lead it off of the place.

Q. And this place on the lower end, about how many rods was that?

A. Just off-hand guessing it was probably about 30 rods.

Q. And how many feet was the ditch enlarged?

A. I really couldn't say what the total of it was because the bank keeps crumbling down all the time, but as near as I remember it was something like two feet there at the narrowest place. Of course I never took any measurement and don't know just what it was.

[190] Q. Do you know Mr. A. M. Lachman?

A. Yes, sir.

Q. Is his place between yours and the head of the ditch? A. It is.

Cross-examination.

Q. (Mr. GRAVES.) Counsel used the term "enlarged" in inquiring of you. As I understand it, at one point there in the ditch through your place they worked on it to repair it because it was breaking.

A. Yes, sir.

Q. And in that repair work at that particular

(Testimony of F. J. Page.)

point the ditch was made a little bit larger.

A. At the east line it was made a little bit larger.

Q. But the rest of the canal they did not enlarge the carrying capacity of?

A. I don't think they did only at that one point I speak of.

Q. And that had been breaking there and the water running out onto the land?      A. It had.

Q. And this repairing at that point was to keep it from doing that?

A. Yes, sir. I believe I stated that.

Redirect Examination.

Q. (Mr. GARRECHT.) As I understood you there were two [191] places upon which work was done, or was it only one?

A. Only one what I call enlarged.

Q. That one that you call enlarged was an actual change in the width of the ditch, was it?

A. Why, that is the way I remember it, yes.

Q. And at the other place it was a mere repair?

A. It was making the lower bank stronger.

Q. They were not both then cases of repair?

A. Well, of course you would call it repair. They was making it stronger so it wouldn't keep a-breaking—the ditch. It broke fourteen times there in those thirty yards, but the bank was weak and they went into the upper side and took out the dirt there and then on the lower side they—

Q. You are talking about the upper place, are you not?      A. Yes, sir.

Q. I want to get you away from that place for a



(Testimony of F. J. Page.)

moment and to speak of the 30-rod work. Now that 30-rod work, what was that, was that an enlargement of the ditch at that point?

A. That is what I called it, an enlargement; yes, sir.

Q. That was not a mere sliding of the bank at that point then?

A. No. No, the ditch was too narrow there and held the water, that was what made the break above, and they widened it so as to let the water off the upper end of my place.

Q. Did they or not give that 30 rods a greater capacity than it had ever had before at that point?

A. They straightened the ditch up and made it a little wider [192] at the bottom, and they cut a point there to let the water draw off better.

Q. How long were the men working on that part of the canal, do you know? A. I couldn't say, no.

Q. Now, in this testimony you have been giving lately you are referring to the second of the two jobs on that ditch, not the Bradshaw job, but a later job?

A. Not the Bradshaw job, but a later job, yes, sir; something, I should judge, like two years after that, but I couldn't say certain.

Q. When Bradshaw and those fellows were working on there did they increase the capacity of the ditch at that point?

A. I couldn't say, but on the upper part they plowed the bottom and plowed the sides and then worked the dirt over, so whether they were enlarg-

(Testimony of F. J. Page.)

ing it or not I couldn't say, but that was my impression, that they were enlarging it.

Q. How long did they have their men there?

A. No, I don't remember, I wasn't interested. They had a large crew come on my place for several days, but they worked both ways from my place.

Q. How many men and teams would you estimate they had?      A. I don't know how many they had.

Q. How many were they working on the job the second time?

A. I really don't know anything about that either.

Q. Did they have quite a force there then?

A. Why, they had a few teams and a few men. In order to make that more plain, they would go in with a plow team [193] ahead and then come along with the men with the picks and then with scrapers and shovels and they were in there quite a few days with quite a number of men, but how many I couldn't say.

Q. Did they make the bottom of the ditch lower?

A. I think they made the bottom of the ditch lower, took a little off the high places and leveled it up—took a little off the high places and put it on the low places and leveled it up there.

Q. You say you were on that ditch 25 years?

A. Yes.

Q. Prior to this enlargement by Sharp—

Mr. GRAVES.—I would just suggest the witness did not use the word "enlargement" as his own term, and I object to counsel's using it, except as the witness wants to use it, as being leading.

(Testimony of F. J. Page.)

Q. Did or did not the Sharp and Bradshaw work give a greater capacity than the ditch had at any time prior to that job?

A. I really believe that is out of my power to answer that question because I ain't no engineer; I really wasn't interested and I don't know that they did, but I really believe they did, because they leveled it up and straightened it up so it carried more water, but to give an expert opinion on that I don't think I could answer it.

Q. No, as a practical man, I ask you, as a man familiar with running water in a ditch.

A. That was my opinion; yes, sir.

Q. Now, then, the work subsequent to that time: did they make the ditch larger, would you say as a practical man, [194] than it had been prior to that time?     A. That is, the last work I spoke of?

Q. Yes, sir.

A. Yes, sir. It made it stronger right there and made it carry more water.

Recross-examination.

Q. (Mr. GRAVES.) Right at that point it made it stronger and a better ditch?     A. Yes, sir.

Q. Did you see the carrying capacity of the flumes?     A. No.

Q. You were not at the head end to see whether or not that was enlarged?     A. No, sir.

Q. But right at this particular point it made a better ditch of it?

A. Yes. They carried it off better that way.

(Testimony of F. J. Page.)

Q. Instead of the water going around a point they straightened it out?

A. They straightened it up and made it draw better, yes.

(Witness excused.)

**Testimony of A. M. Lechman, for Plaintiff (in Rebuttal).**

[195] A. M. LECHMAN, produced as a witness for plaintiff, in rebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. GARRECHT.) Where do you live?

A. One mile west of Thorp.

Q. Occasionally your name has been spelled a little different?      A. I used to spell it different.

Q. How?

A. L-a-k-m-a-n sometimes and L-a-c-h-m-a-n.

Q. You are a brother of Maggie Lechman, who testified here yesterday?      A. Yes, sir.

Q. Did you state where you were living?

A. About a mile west or northwest from Thorp.

Q. Do you live on this West Side or West Kittitas canal?      A. Yes, sir.

Q. And where is your place with reference to the head of the ditch from Mr. Page's place?

A. It is possibly half way to the head from Mr. Page's, I would judge.

Q. You would be towards the head of the ditch from Mr. Page's place?      A. Yes, sir.

Q. Now, Mr. Lechman, I hand you Plaintiff's Exhibit "K," which is a photostatic copy of stream



(Testimony of A. M. Lechman.)

observations of gage heights made on the West Side or West Kittitas canal, for the months of July to September, 1905, and ask you to examine those sheets that are attached to the certificate and say in whose handwriting those figures and letters are, other than the ones that are marked by [196] Maggie Lechman.     A. They are mine.

Q. Now, will you just state how those were taken?

A. Well, when they first put that gage in—I forget the name of the man that put it in or had charge of putting it in—he asked me about reading the gage, if I would have the time to read the gage; I told him I would, and he instructed me as to how to read it, and gave me the books or cards to send in reports, and I started in as instructed and read the gage at the times given.

Q. Now, did you make memorandums at the time of the readings—put them in the book when you read them?     A. Yes, sir.

Q. Well, how are they as to accuracy—how close?

A. Well, as to accuracy, I tried to do the best I could, and the record, I would say, is as close as any ordinary person would get it. I always read them conscientiously and tried to be fair in the readings.

Q. Now, where was this gage placed in the stream, the place where the readings were taken?

A. There is a bridge just above our house and it was placed on the lower bank, on a timber of the bridge that goes down into the ditch.

Q. It was fastened there, was it?     A. Yes, sir.

Q. Were you living there during 1905?

(Testimony of A. M. Lechman.)

A. Yes, sir.

Q. Any time after 1905 were there any changes made in the ditch going through your place, Mr. Lechman?

A. There was considerable work done there after that time [197] as to the exact dates I don't remember, but it was after 1905.

Q. Will you just state what was done to the ditch as it went through your place there?

A. Well, as close as I can remember—that is, I don't know how much was taken out, but judging from the kind of work that was done and my observation, I should judge it was widened; it was taken off the upper bank or, that is, the upper slope, and widened along through there and also deepened to a considerable extent—certain extent—and I would judge it was widened from where it strikes out line, just below the gage, on down half way through the ranch, at least as wide, and I would judge on an average of about 2 feet—some places possibly less, some places a little more.

Q. Have you any way of fixing the fact that it was enlarged, any physical fact, out there through your place?      A. Yes, sir.

Q. State what it was.

A. There is a pipe-line that runs through and under that ditch; I helped put the pipe-line in and dug the ditch to put it in and know at what depth the pipe-line was put and what depth it is at the present time; I have had to take it up, or I dug it up to find out if there was enough of covering over it to pre-

(Testimony of A. M. Lechman.)

vent it freezing during the winter, as we have had some trouble with that, and that pipe-line we aimed to get 18 inches in all places, and under the ditch it was placed thereabouts, I wouldn't say it was exactly 18 inches, but it was placed thereabouts.

[198] Q. And how is that pipe in there now since this work was done?

A. Well, about 4 feet from the bottom of the upper slope the pipe is 9 inches deep at the present time, and as the pipe approaches the upper slope it runs down so in one place it is just four inches deep—nearly on the surface.

Q. Now about how many people and teams were at work there through your place during the time these changes or work was done?

A. Well, I don't recollect just how many. There was quite a crew. Of course what we consider quite a crew there some would consider—

Q. Was there more than one team?

A. Yes, sir, there was.

Q. Could you approximate how many teams?

A. Well, to my recollection there was in the neighborhood of six or eight teams, if I remember right. There was quite a crew for that work right around there at that time.

Q. And could you give an idea of about the number of men at work with the teams?

A. No, I could not; but if there were, say, eight teams there would possibly be eleven men—eleven or twelve men would constitute a crew for that many teams.

(Testimony of A. M. Lechman.)

Q. How many days were they working through your place?

A. That I don't remember. They were there for several days, but how long I haven't the least recollection, because I had other work to do and just see them around when I was in around the place.

[199] Q. In order to fix this date as near as you can I will ask you whether or not it was before or after you took these readings.      A. It was after.

Cross-examination.

Q. (Mr. GRAVES.) You are a stockholder in the West Side Irrigating Company, are you?

A. No, sir.

Q. Your father is not either?      A. No, sir.

Q. Was it your father who testified yesterday?

A. Yes, sir.

Q. You and your father are not on good terms with the officers of the West Side Irrigating Company, isn't that so?

A. I never have had any quarrel with them.

Q. You have not, but he has?

A. Well, they had little differences, but it wasn't—the only difference he ever had was with one of the directors—that is, he was a director at one time, and it seems they were always at outs and naturally when they were thrown together they didn't get along very well. They had their dealings several years before that caused hard feelings.

Q. In the working of a canal of that kind, where it is a dirt canal, dirt washes in every winter season, does it [200] not?



(Testimony of A. M. Lechman.)

A. It does to a certain extent.

Q. Moss will grow and accumulate and has to be cleaned out—that is true, isn't it?      A. It is.

Redirect Examination.

Q. (Mr. BURR.) Mr. Lechman, in that work that was done that you have testified was similar work, done in the length of canal between you and the place where the old and new sections of ditch joined, was that work all similar? What I mean is this: there was a point up there, was there not, where an entirely new ditch was constructed?

A. Yes, sir.

Q. Now, this improvement work that you have told us of as having been done through your place, was similar work done down to the lower end of the new section, or was it not?

A. Well, I don't know from personal observation that it was. I know that there was work done up there and in the field adjoining ours, as far as I could see. I have seen them working there, watched them work, and work was done above, but I can't say I was right to the work or know what was done exactly right above that place.

Q. They were working with teams on that section up above [201] you for sometime, were they?

A. Yes, sir.

Q. For how long would you say?

A. Well, that I haven't the faintest recollection.

Q. How far is that section from the upper end of your place up to the junction with the old ditch that was abandoned, would you say?

(Testimony of A. M. Lechman.)

A. I would say about a mile and a quarter, possibly not quite that far.

Q. Now then, below your place were they doing similar work that year?

A. Well, out of sight of the place—that is, where we couldn't see from our house. I don't remember just seeing them working, except along at Mr. Page's, I supposed they worked all along, but I can't say I saw them working all along, but I see them working—

Mr. GRAVES.—Just what you know, Mr. Lechman.

A. (Continued.) Well, just what I know? I know they worked all through our place; how much work was done below I don't know as well as the work that was done near the house.

(Witness excused.)

**Testimony of Paul Taylor, for Plaintiff (Recalled in Rebuttal).**

[202] PAUL TAYLOR, recalled as a witness for plaintiff, in rebuttal, testified:

Q. (Mr. BURR.) Mr. Taylor, you have had opportunity to examine the figures presented by Plaintiff's Exhibits "J" and "K," and I will ask you whether from the figures thus presented it is possible to adduce the amount of water flowing at the point of measurement, to wit: at the gage, for each of the days on which observation was taken.      A. It is.

Q. Have you the computations for the year 1905?

A. I have.

Q. In accordance with the figures presented by

(Testimony of Paul Taylor.)

those exhibits?      A. Yes.

Q. I hand you this sheet, Mr. Taylor. Will you testify as to whether or not those computations are presented correctly upon that sheet?

A. They are. They are my own figures.

Mr. BURR.—I offer that sheet in evidence.

Sheet referred to offered in evidence, marked Plaintiff's Exhibit "P" and returned and filed herewith.

Q. Now, Mr. Taylor, the figures contained on Water Supply Paper No. 135, being Plaintiff's Exhibit "E," showing the discharges of the West Kit-titas Canal, found on page 109 of said Water Supply Paper: Will you state whether or not you have checked the computation shown for the discharges upon that page?      A. I have.

Q. Will you state how far they are correct?

[203] A. I found quite a few places where I could not agree altogether with this Water Supply Paper, the data being given to the nearest second-foot.

Q. How great is the variation, Mr. Taylor?

A. The maximum variation that I found was a little over three per cent. That occurred in only one case. The others are within two per cent or less.

Q. Do the figures shown upon that page of the Water Supply Paper referred to, or do they not, agree with the figures as to cross-section and current meter measure given by George F. Harley in Plaintiff's Exhibit "O"?      A. They agree.

Q. What kind of a mathematical computation is it,

(Testimony of Paul Taylor.)

Mr. Taylor, to check these figures; that is, is it a fairly simply or a complex one?

A. That is purely a mathematical application of gage heights to discharge, after you have developed your discharge curve from the measurements made.

Cross-examination.

Q. (Mr. GRAVES.) What do the words on page 111 of this Water Supply Paper No. 135, Plaintiff's Exhibit "E," mean, under the heading "West Kit-titas, irrigated area 7,000 acres"? What does that mean in this Water Supply Paper?

A. That means for that year 7,000 acres was the approximate area irrigated.

[204] Q. Where you use the word "discharge" in these columns—under the word "discharge"—does that mean the number of second-feet passing that particular gaging station?

A. At that particular gaging station.

Q. This particular gaging station referred to in this Water Supply Paper, No. 135, Plaintiff's Exhibit "E," was that the one at the Lechman place?

A. The gage heights are those at the gaging station, and I see a note here that this was measured in a 14-foot flume, and I assume that was made in Gordon's flume. I might explain that it is a common practice for hydrographers to measure the discharge at any place along the ditch where there are better conditions than there might be at the gage. The conditions for the gage or the gagings are now always identical.

Q. For instance, you would not expect any high



(Testimony of Paul Taylor.)

degree of accuracy to be found at your gaging station where the water by reason of the shape of the banks or the bed of the stream is such that the water swirls and eddies instead of running in a smooth and regular flow—such a point as that, where the water would operate in that way, that is, where there were swirls and eddies, would not be a satisfactory point to take a measurement, would it?

A. That would not be a satisfactory point for a measurement, but it might be a good place for a gage.

Q. Now referring to Plaintiff's Exhibit "O": Do you know where the measurements were taken from which you got those figures?

A. Now, I want to make it clear to you that in both cases [205] the gage is located on the up-stream side of the bridge, and looking down-stream, on the left-hand side. Now, then, in 1905 those measurements were made right from that bridge, but in 1904 they were made in that 14-foot flume, which was probably Gordon's flume—I think that is what they call it up there.

Redirect Examination.

Q. (Mr. BURR.) Are you familiar, Mr. Taylor, with the condition of the water at that bridge on Lechman's place?

A. I have been perfectly familiar with that location since 1912; that is, I have come in personal contact with it since 1912.

Q. And what do you say the condition of the water was?

A. The conditions there are all right for gaging.

(Testimony of Paul Taylor.)

The only thing is that in gaging from Gordon's flume—it's simply easier, that's all there is to it. That is the reason why we go up there sometimes. There have been one or two diversions, I don't remember off-hand, small diversions, between the two places, but when we make measurements there ourselves we do it either when those people are not diverting any water themselves or if we find they are we make gagings at both places.

Q. (Mr. GRAVES.) You mean you have been doing that since you have had charge of it?

A. Yes, sir.

[206] Q. Whatever readings the Lechmans or those others made, you do not know anything about that?

A. I do not know anything about that only what is shown in the water supply tables.

(Witness excused.)

Mr. BURR.—That is our case, except possibly we may have a little surrebuttal.

PLAINTIFF RESTS.

**Testimony of Mitchell Stevens, for Defendant  
(Recalled in Surrebuttal).**

[207] MITCHELL STEVENS, recalled as a witness for defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) I think you stated that you had been acquainted with the West Side Irrigating Company's canal since 1889.

A. Yes, sir, more or less.

Q. Mr. Stevens, did you know the size of the flumes

(Testimony of Mitchell Stevens.)

on the West Side Irrigating Company's ditch at the time those flumes were constructed or afterwards?

A. Yes, sir.

Q. What have you to say as to the size of the flumes as built there by Mr. Ellison, in 1889, as compared with the size of the flumes now?

A. They are the same width.

Q. Are there any of those flumes that are still in existence as originally put in?

A. Yes, sir. The Gordon flume, the sides of the flume are still there—there has been a new flume put in it, but the sides are still there, and the flume in the Ellison field is still there.

Q. The flume called the Ellison flume is the same flume?     A. That is the same flume.

Q. Just briefly, when was there any work of any moment or any importance done upon this canal after its construction in 1889—about when?

A. Well, there was repair work done different years, but in 1903 and 1904 Sharp, Bradshaw & Coleman did the largest amount of work.

Q. I don't remember whether you testified to it or not, but what was the financial situation or financial condition [208] in Kittitas County during the '90's?

A. They were very bad; a good many people went broke; it was hard to raise money to—

Mr. BURR.—One moment. We have not introduced any testimony to contradict what was gone into in regard to that in your case in chief.

Q. Now, Mr. Stevens, what was the fact as to the

(Testimony of Mitchell Stevens.)

condition the ditch had gotten into during that period?

A. It had gotten into very bad condition along the side hills. The side hills along that ditch in the Gordon place and along by the Mrs. Bond place and along through the Page place were bad about slipping—slipping into the ditch.

Q. Now, in substance, what work did Sharp, Bradshaw & Coleman do? What was the character of the work which they did?

A. Well, they cleaned out those slides and in places—there at Page's they broke the lower bank of the ditch—there was a narrow place there at Page's, just above the road, and they widened it there.

Q. That was in 1903 and 1904?

A. That was in 1904; they worked the lower end of the ditch in 1903, and I can't just remember whether they started in in the spring of 1904—about the middle of the ditch they started in in 1904, in the spring, and worked the upper end of the ditch.

Q. Now, there have been some readings of the canal in 1904 and 1905 given here. I want to ask you what was the condition of the ditch during those years.

A. Well, their work was fresh and the side hill there at [209] Page's always was porous, it used to be a very difficult place to hold water, and particularly just above the road, and they worked there in widening it somewhat, and the work was fresh and it broke very badly there the summer of 1904. I wasn't a trustee, but I was interested in the ditch



(Testimony of Mitchell Stevens.)

and I went up there two or three times and looked those banks over and made a study of the banks in the summer of 1904. The ditch broke there one time and washed out a great hole, it took three or four days to fix it, and they turned the water in and it broke out again the next day; then they fixed the ditch again with—well, I went up there after it broke and suggested that they put in some boards in the ditch where it was broke on the lower side and make a board wall and put the dirt in on each side. The dirt was so porous and full of gravel it was hard to make fresh work stand. They put in these boards and my recollection is the hole was cut for so deep that in a portion of that hole the boards were 16-foot long. That time it stayed. They were very careful in putting the water in there, raised it an inch a day.

Q. What was the fact in the years 1904 and 1905, after this work had been done, as to the banks being weakened because of recent construction and the like?

A. Well, in 1904 and 1905 the banks were weak through the Page place and through the Ellison place and broke frequently—broke a number of times. The summer of 1905 it broke in the Ellison place and broke in the Page place and broke in the Jim Stevens place, just below there—it's a continuation of that same bank.

[210] Q. Mr. Stevens, has there been any change in the carrying capacity of that canal since 1905, since the work done by Sharp, Bradshaw & Coleman in 1903 and 1904?

(Testimony of Mitchell Stevens.)

A. Only this, that the flow is steady. Last year the banks never broke at all, the full length of the ditch and—

Q. Well, the point is, was the capacity of the canal itself increased?

A. The capacity is the same, but the ditch in 1904 and 1905 couldn't be handled in the same way that we handle it now on account of those banks. The size of the ditch, as I understand it, is the same.

Q. Now, Mr. Stevens, did you see this meter which the Lechmans were reading?

A. I didn't see the meter. I saw the gage and saw the bridge.

Q. Just state what sort of gage it was.

A. The gage was a piece of wood with figures on it, nailed to the corner of the bridge; the bridge is a common road bridge, sixteen feet wide, and the abutments consisted of posts, about five in number, on each side, and then there is a plank wall back of that to hold the dirt from going into the ditch; the bottom there is a dirt bottom; the contour of the ditch above is irregular, somewhat irregular; the banks of the ditch above are rocky and rough and also below the bridge, and one time when we went along that meter, the sediment had settled in on the bottom of this rod some four or five inches.

Q. They were not using a current meter there at that point [211] —you saw them, but you did not see anything but this meter or, rather, this gage?

A. Well, I didn't see them use a current meter. I suppose they did in the first place. I suppose they

(Testimony of Mitchell Stevens.)

used a current meter when they took the original reading.

Q. What would you say as to how a current meter should be used there at that point?

Mr. BURR.—This witness has not been qualified as an engineer and he is incompetent to testify as to current meters, unless his competency is first set forth and shown.

Q. You may state what the condition of the water was there, Mr. Stevens, and where this gage was.

A. The water at such a point is full of riffles and swirls and eddies. The current is not uniform, it can't be.

Q. How many acres of land, substantially, were under cultivation and being cultivated and irrigated from this canal in 1905?

A. Over seven thousand. We figured that up one time, I can't remember the exact acreage, but its over seven thousand.

Q. Is that same acreage being watered now?

A. Yes, sir.

Q. Has there been any increase in the acreage?

A. I don't know of any. I am quite familiar with that country, but I don't know of any new acreage.

Q. Do you know about Splawn and Ellison's old canal that they had there before you built your canal? Did you know of their having a canal there?

[212] A. Yes, sir. I was there before the ditch was made and saw the old—I was there before the West Side ditch was built and saw their ditch.

Q. When the West Side ditch was built what be-

(Testimony of Mitchell Stevens.)

came of that old canal?

A. The West Side took up that canal.

Q. The other ditch ran right to the river, didn't it?

A. Yes, sir.

Q. And the water which they got you carry or is allowed to be carried through your canal?

A. Yes, sir. And we allow them to take their water, we don't turn it on or off or bother with it. Their ditch comes out a little ways below the head of our ditch.

Mr. BURR.—We object to oral testimony concerning that matter. The contract itself should be introduced.

Mr. GRAVES.—The contract is in evidence. You introduced it yesterday.

Mr. BURR.—We introduced but one; there are two contracts, one with Splawn and one with Ellison.

Q. Do they turn the water out before it reaches the Gordon flume, the first flume?

A. Yes, sir.

Q. So the dimensions of the Gordon flume at that point in the ditch represents the carrying capacity for the stockholders of the West Side Irrigating Company?      A. Yes, sir.

Q. As shown by Defendant's Exhibit "2" in this record, the contract between Clinesmith and Clerf and The West Side Irrigating Company.

A. Yes, sir.

[213] Mr. GRAVES.—I am not sure that I proved by Mr. I. E. Anderson, the civil engineer, what season of the year he took the readings there in 1912 and 1913.



(Testimony of Mitchell Stevens.)

Q. Do you know, Mr. Stevens, when Mr. Anderson was taking his readings there? A. Yes, sir.

Q. What time was it, what month in the year?

A. September.

Q. What is the fact as to the amount or irrigating in the Kittitas valley in September as compared with the summer months of June, July and August?

A. During that time we were not irrigating much.

Q. So that his readings taken at that time do not represent or indicate the full capacity of the canal?

Mr. GARRECHT.—We object to that as argumentative.

A. Oh, no. The ditch was not near full.

Q. It was testified here that in 1909 there was some work done. Was that the work at the head of the canal or intake?

A. In 1909 we made a new intake.

Q. That is the one Mr. Ellison testified to yesterday? A. Yes, sir.

Q. Now, there was some testimony that along about that time there was some work done along the canal. What work was done along the canal?

A. Well, there at Mr. Lechman's the ditch runs through his corral and his stock wore off the banks, and where the bank of the ditch touches the hill, where it starts to climb the hill, the banks are weak and we took dirt off of the upper side of the ditch and ploughed it in [214] against the lower bank to make it stronger—made the banks heavier. We didn't widen the ditch there, we cleaned out the ditch.

(Testimony of Mitchell Stevens.)

Q. The dirt had been carried down by stock climbing up over the hillside by the canal, I understand?

A. Yes, sir.

Q. You heard Mr. Page tell about work done in his field. What was the character of that work? Was there any done there in 1909? You referred before, I think, to the work done there in 1904 and 1905.

A. In 1909 we cleaned it out good. That is on a sidehill, a steep sidehill,—and his stock runs up and down the hill—it's right below his barn—and the rocks and sediment works down into the ditch. We cleaned that all out, and in addition to that we went back into the bank and we used the dirt to reinforce the lower bank where it was weak, where it had been breaking; and in addition to that we put in a board wall 800 or 1000 feet long, and the object of the board wall was to stop the filtering of the water through there, and the object of the dirt was to hold the dirt against the wall so that the sediment would settle against the wall; and we cut down the side of the hill and we used that excavation in placing against this wall. We didn't make it any wider than it was above there.

Q. What year was that? Do you recall whether that was in 1904 and 1905, or was that in 1909 that you put in that board wall?

A. I am not sure about the year. It was somewhere from 1905 to 1909, but it's pretty hard for me to recall the [215] year.

Q. What is the fact as to the character of con-

(Testimony of Mitchell Stevens.)

struction of that canal? Is it excavated in dirt except where there are flumes?

A. Yes, sir, dirt and gravel.

Q. There is no concreting of that canal?

A. No, sir.

Q. What is the fact as to a dirt canal such as that, located as that is along hillsides, as to its filling up and the like?

A. Every year the frost loosens up the upper bank and the dirt and gravel works down into the canal and has to be removed.

Q. How do you remove that; how is that taken out of there?

A. We plough along the upper corner in the bank and—

Q. Well, you take it out with ploughs and scrapers, did you?

A. Ploughs and scrapers, yes, sir.

Q. So when Lechman saw you working along there you were taking dirt out of the ditch?

A. That had settled in there—filtered in there—worked in there.

Mr. GRAVES.—I think that is all.

The WITNESS.—I would like to state that in 1905 the upper end of the ditch at the river gave us a lot of trouble. The river had washed out just opposite the ends of the ditch and—

Mr. BURR.—I think that is pretty well in the record. You gave testimony on that before you closed your case.

Mr. GRAVES.—I don't think we have given it as

(Testimony of Mitchell Stevens.)

to the year. There was testimony on the point that the ditch changed [216] frequently, but I would like to have this go in as to 1905. Just go on, Mr. Stevens.

The WITNESS.—We were unable to run the ditch full the latter part of the season on that account, we couldn't get it in up there at the upper end. We started in there in the fall and put in a stone and brush dam, under the supervision of Mr. Burroughs, I think it is, in the fall of 1905.

There is another point I would like to state to you: In the early history of the ditch the slides from the hill were far worse than they are now. In 1906 we cut down those slopes to some extent, notably in Mrs. Ellison's field. We went up the hill quite a ways, and we used that dirt, we used that excavation, in plating the lower bank in Mrs. Ellison's field so it would stand. That added safety to the ditch.

Q. (Mr. GRAVES.) There was no cause for your increasing the carrying capacity of the canal over its original construction, was there?

Mr. GARRECHT.—Objected to as leading and incompetent, irrelevant and immaterial.

A. No, sir. Generally the ditch was big enough and we didn't widen the ditch except at certain narrow points where it filled in from the hill.

Mr. GRAVES.—That is all.

The WITNESS.—I would like to state the further fact, I do not think I have referred to it, that there is a cut just below my field, at Prather's, and the dirt slips in there during the irrigating season;



(Testimony of Mitchell Stevens.)

it's next to impossible to get it all out o there with the kind of [217] tools that we have, and in 1905, owing to the fresh work done by Coleman and Bradshaw, there was lots of sediment in the ditch, there was a slide in the Prather cut and the ditch was nearly half full of mud that fall, caused by the slides below in the Prather cut. In 1906 we put a board wall in the Prather cut, consisting of cedar posts and plank two inches thick and braced from the opposite bank and four feet high to keep those slides out, and since that time the sediment never has settled in our field.

I would like to state another fact in regard to the slides there at the mill pond—

Mr. GRAVES.—I asked you generally about those. I only wanted with reference to the years 1904 and 1905, I do not care as to other years. If this has not reference to anything occurring in 1904 and 1905 I do not care for it.

The WITNESS.—No, not those years.

#### Cross-examination.

Q. (Mr. GARRECHT.) You say that the ditch was big enough to carry all the water you wanted from the very beginning?

A. In all but just a very few places. There was a few narrow places. Now, whether those were originally excavated or not I couldn't say. All those narrow places [218] are in cuts.

Q. And you were carrying about the same amount of water during all those years except during the time when you had these break-outs?

(Testimony of Mitchell Stevens.)

A. Yes, sir, I think so.

Q. When did you see this water gage there on the bridge—1903?

A. No, I didn't see it till 1905.

Q. Well, you saw it there in 1905. During the summer?      A. Yes, sir.

Q. You knew what it was?      A. Oh, yes.

Q. Did you know why it was there?      A. Yes.

Q. You knew that the Government was making an estimate of what water was going into these various ditches?

A. Well, that was my understanding. I understood so.

(Witness excused.)

**Testimony of J. M. Burch, for Defendant (in Surrebuttal).**

[219] J. M. BURCH, produced as a witness for defendant, on surrebuttal, having been first cautioned and duly sworn, testified:

Q. (Mr. GRAVES.) Where do you reside, Mr. Burch?      A. In Ellensburg at present.

Q. You were county commissioner up there and are now in the city council?      A. Sorry to say yes.

Q. Are you a stockholder in The West Side Irrigating company now?

A. Not at the present time, no, sir.

Q. Were you ever connected with The West Side Irrigating company?      A. Yes, sir.

Q. What time did you first become connected with the company?

(Testimony of J. M. Burch.)

A. Well, I was one of the first organizers of the company, and from that time up until 1904, the fall of 1904—December, 1904.

Q. You were acquainted with the canal though from the time of its first construction down to the present time? A. Yes, sir.

Q. When did you remove from there to Ellensburg, or remove from the West Side? Do you remember when it was? A. Two years ago this month.

Q. 1913? A. Yes, sir.

Q. Mr. Burch, what was there there at the head of the canal when the construction of the West Side ditch was begun? Was there any ditch when you first started the West Side canal?

[220] A. Yes, sir. Mr. Ellison and Mr. Splawn had a ditch there.

Q. What effect did the construction of the West Side have upon the old ditch?

A. We had to take up that ditch in order to get a right of way for ours.

Q. Since that time have they been taking water out of your ditch?

A. Yes, sir, they have, unless it is the last two years. I don't know whether Mr. Ellison took it out or not; I know Mr. Bruton did.

Q. Was the water which they carried through your canal any part of your appropriation?

A. No, sir.

Mr. GARRECHT.—We object to that. That is of record, if anywhere. Mr. Burch's recollection on the subject is absolutely valueless as compared with the

(Testimony of J. M. Burch.)

record, and the record should be introduced.

Mr. GRAVES.—The record has been introduced.

Mr. GARRECHT.—No, it has not been, Judge. The other contract is not here and this is for only 500 inches.

Mr. GRAVES.—I would just as soon have it in. I have a copy here, but it is not certified. This is from my personal files, that I had prepared for my use, but it is not certified.

Mr. GARRECHT.—We do not have any objection to it because it is not certified, but I make the objection, and I think it is a valid one, that it does not prove any appropriation by these people.

Mr. GRAVES.—I do not care to introduce it, as far as that is concerned. I will put in the oral testimony.

[221] Mr. GARRECHT.—We object to that on the ground that it is not the best evidence.

Mr. GRAVES.—I tender this paper as a copy of the agreement.

Mr. GARRECHT.—We have no objection to the copy tendered on account of its not having been certified, but our position is that that does not prove any appropriation of water at all by these parties as against anybody else.

Paper writing referred to offered in evidence, marked as Defendant's Exhibit "4," and returned and filed herewith.

Q. (Mr. GRAVES.) Mr. Burch, are you acquainted with the flumes upon this canal?

A. Yes, sir.

Q. Did you know them when they were put in, in



(Testimony of J. M. Burch.)

1889, by Mr. Ellison?      A. I did.

Q. How does their carrying capacity as they now stand compare with their carrying capacity in 1889, the carrying capacity of those flumes?

A. They are all the same unless it would be one flume down on Mitchell Steven's place; that is narrower, but they went across the canyon and they gained more fall and they cut off about 30 rods of ditch, so I would think it would be about the same. The others are the same.

Q. Are there any of those flumes as now maintained there that are the same as they were originally constructed?      A. There are two there.

Q. State the location of those.

A. There is the flume in the Gordon field and the flume in Mrs. Ellison's field.

Q. That one in Mrs. Ellison's field, is that the one that [222] was originally constructed?

A. Yes, sir.

Q. And how about the Gordon flume?

A. That is the same.

Q. You heard Mr. Mitchell Steven's testimony here regarding trouble in 1904 and 1905 with the canal. What is your recollection, just briefly, on those points?

A. I would have to give my recollection in 1903 and 1904. In 1904, in December, I was not a director, and in 1905 I had no active part in the workings of the ditch.

Q. Now, then, what were the conditions there in 1903 and 1904—what was being done?

(Testimony of J. M. Burch.)

A. In 1903 we let Sharp and Coleman have a contract to put the ditch down through its original construction, or as originally planned.

Q. What had been the fact during the late '90's and early 1900's about the ditch having gotten out of repair and filled up and the like?

A. Well, the ditch never was finished.

Q. Well, how do you mean never finished?

A. I mean that the contractors went broke when they got about half way through, and the lower end was never finished.

Q. The lower end?      A. No, sir.

Q. Was that completed in 1903?

A. Well, in 1903 and 1904 it was. It was finished up on the original estimate on the contract with Clinesmith and Clerf.

Q. Do you remember about the time of the making of the contract [223] with the Government of the United States, that that was done by the trustees about 1905?      A. I didn't know it at the time.

Q. You heard about it at the time it was done, didn't you?

A. I didn't know it was done until six months afterwards.

Q. At that time, in 1905, was there the same area under cultivation and irrigation from the ditch that there is now?

A. Why, I think practically the same. I don't know of any new land.

Q. How many acres have you estimated were under the canal and irrigated from the canal?

(Testimony of J. M. Burch.)

A. Well, I never made an estimate of that. They used to claim there was between 7,000 and 8,000 acres. Mr. Sharp and Stevens made an estimate of that, but I never did.

Q. You never went into that?

A. No, I never went into that part of it.

Q. Were you present at the meeting of the stockholders, in Ellensburg, in 1906, when the question of validating this contract with the United States came up, or do you recall that?

A. After it had been signed?

Q. Yes.

A. No, sir, I was not there.

Q. You were not present at that time?

A. No, sir. Not after the contract had been signed, no.

Q. I call your attention to December 2d; there was a called meeting of the stockholders to be held January 2, 1906—the contract was signed by the board of trustees in [224] the fall of 1905. Do you recall being present at a stockholders' meeting in January, 1906, when a motion was carried not to carry out this contract with the Government?

A. I was there when there was a motion made not to concede anything to the Government, but I didn't know there had been a contract signed at that time.

Q. You did not know at that time there had been a contract signed? A. No, sir.

Q. But you recall being present at the stockholders' meeting when that action was taken?

A. Yes, sir.

(Testimony of J. M. Burch.)

Q. Did the stockholders at any time to your knowledge, any of them, ever ratify that agreement after they discovered that it was made?

Mr. BURR.—You mean as individuals?

Mr. GRAVES.—Yes, as far as he knows.

A. Do you mean at a stockholders' meeting?

Q. I mean did the stockholders ever ratify it in any way?

A. Well, not to my knowledge. They might have done it when I wasn't there.

Q. What did the company do from 1905 down to the present time as to paying any attention to this contract? Did it limit itself to the 80 feet or go on and use the amount of water they had been accustomed to use?

A. I don't think they ever paid any attention to it. They did not up to the time I sold my place.

Q. Well, that was after this suit was commenced that you sold your place?

[225] A. Yes; two years ago.

Cross-examination.

Q. (Mr. BURR.) Mr. Burch, you say there were a couple of flumes put in there in 1889 that are still in existence. Did I understand you to so state?

A. Practically the same, yes.

Q. Haven't they been reconstructed since that time?

A. Oh, they may have had new bottoms, yes.

Q. What kind of wood are they made of?

A. Fir.

Q. I would like to know what kind of wood it is



(Testimony of J. M. Burch.)

that will last 26 years. Are you confident those two flumes have lasted 26 years without complete reconstruction?

A. Well, they may have put new bottoms in one time and things like that.

Q. New bottoms in one time and new sides another? A. Yes, they could have done that.

Q. Now, Mr. Burch, are you familiar with the country south of Ellensburg there, near town, at all?

A. Some.

Q. Do you know where Mr. Becher lives?

A. Jake Becher?

Q. I think so, yes. It's south of town—the Becher place. A. Yes. I think it's Emil Becher.

Q. Now, has he not increased the amount of land he is irrigating in the last 10 years—in fact, in the last 4 [226] years has he not increased it?

A. Well, there are three or four Bechers. If you will tell me the one you mean—I would like his first name.

Q. Has any one of the Bechers increased his irrigation down there just south of town? I don't know Mr. Becher's first name.

A. South of town would be on the other side of the river, towards Yakima. Southwest of town you would get in on—

Q. No, I mean below town, on the west side of the river. Isn't there a Becher ranch there?

A. Yes, there is a Becher ranch there, but that is an old, improved ranch when he bought out there—the old Damman place.

(Testimony of J. M. Burch.)

Q. Hasn't he bought 20 acres of unimproved land that he has since put under irrigation?

A. Well, I don't know. He might down next to the river.

Q. You don't know whether he has bought 20 shares of new stock or not?      A. No, I don't know.

Redirect Examination.

Q. (Mr. GRAVES.) You say you never paid any attention to this contract with the Government after it was made by your company?

A. No. I never saw the contract.

(Witness excused.)

**Testimony of Jeff H. Lee, for Defendant (Recalled in Surrebuttal).**

[227] JEFF H. LEE, recalled as a witness for defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) There was reference made here a moment ago to the Emil Becher place. Do you know what land that is?

A. I know that Mr. Emil Becher and Charlie White own 80 acres, or about 80 acres, of the Damman place.

Q. That was the old John Damman place, 80 acres of his place? Is that the Damman place you mean?

A. As I understand it.

Q. How long has that place been under cultivation and irrigation, that 80 acres?      A. I couldn't say.

Q. As far as you can remember—how far back?

A. Since 1900 to my knowledge.

(Testimony of Jeff H. Lee.)

Cross-examination.

Q. (Mr. BURR.) Mr. Lee, besides that 80 acres does not Becher own 20 acres more that he has bought within the last three or four years?

A. Not that I know of.

(Witness excused.)

**Testimony of W. A. Stevens, for Defendant  
(Recalled in Surrebuttal).**

[228] W. A. STEVENS, recalled as a witness for defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) Mr. Stevens, when was the Damman place referred to a minute ago in the testimony, when was that first improved?

A. 1872 or '73.

Q. Long before the construction of the West Side Irrigating Company's canal? A. Yes.

Q. Then afterwards the West Side Irrigating Company's ditch covered this land?

A. Yes, sir.

(Witness excused.)

**Testimony of Jeff H. Lee, for Defendant (Recalled  
in Surrebuttal).**

[229] JEFF H. LEE, recalled as a witness for defendant, in surrebuttal, testified:

Q. (Mr. GRAVES.) Mr. Lee, when did you first become connected with The West Side Irrigating Company in any way?

A. In 1904 I bought land under that canal and in the spring of 1905 I was elected a trustee.

Q. Did you do any work for The West Side Irri-

(Testimony of Jeff H. Lee.)

gating Company in 1905?

A. Yes, sir; the spring of 1905.

Q. Just state what it was you did.

A. I started at what we termed the tail of the ditch—

Q. That is the lower end of the ditch, you mean, by the tail of the ditch?

A. Yes, sir. And cleaned the ditch of the big rocks and a small per cent of the slides and rocks the stock had rolled in, halfway. We was in debt and had no money.

Q. Now, then, did you widen the ditch in any way?

A. No, sir.

Q. You learned then the actual size of the ditch from your first acquaintance with the ditch in working on it there in 1905?

A. Yes, sir. We had the measurements.

Q. What do you say as to its carrying capacity now as compared with its carrying capacity in 1905?

A. It will carry more water now than in 1905.

Q. I know, but has the canal been made any larger, just because you cleaned it out?

A. Just cleaned it out, it has been made no larger. We didn't clean the ditch in 1905, didn't have the means nor the time. We cleaned a very small per cent.

[230] Q. At the time these measurements were being taken, during the season of 1905, do you know where that gage was?    A. Yes, sir, I was there.

Q. Was the canal in shape that summer to carry its full capacity of water?    A. It was not.



(Testimony of Jeff H. Lee.)

Q. In 1909 was this canal enlarged in any way?

A. No, sir.

Q. What was done in 1909?

A. The banks were strengthened and the slides taken out at various places.

Q. And a new intake put in at the head of the ditch?     A. Yes, sir.

Q. That testified to by Mr. Ellison yesterday?

A. Yes, sir. I was president of the corporation at that time.

Cross-examination.

Q. (Mr. GARRECHT.) What official capacity were you acting in in October, 1905, Mr. Lee?

A. My recollection is I was a trustee. We have five trustees.

Q. You were a member of the board of trustees that voted to sign this agreement with the Government?

A. I don't think the record so shows. I was not at that meeting.

Q. You were a director at that time?

[231] A. My recollection is I was not at that meeting.

Q. You knew about it?     A. I knew about it.

Q. And you also knew about the gaging of the river there by observers?

A. I was there and seen that gage, but only knew that Mr. Yearwood was with us and said the Government was measuring water. That is all I know about that gage.

(Testimony of Jeff H. Lee.)

Redirect Examination.

Q. (Mr. GRAVES.) You say you have no knowledge of being present at the trustees meeting when this contract was authorized?

A. No, sir, I was not there.

(Witness excused.)

Mr. GRAVES.—I think that is all.

Mr. GARRECHT.—Counsel for the plaintiff now requests the production of the page of the book of the minute records of the defendant company, heretofore read into the record, and which shows that the figures “3500” were crossed out and “4000” inserted above, for the purpose of letting the court determine whether or not the alteration was made at the time of the meeting or otherwise. In the absence of said page of the record counsel for plaintiff purposes to insist that it was an unauthorized alteration.

[232] Mr. GRAVES.—In response of counsel for the plaintiff, counsel for defendant states, that at the final hearing before the judge who tries the case the record will be produced and submitted to him, but we decline to tear out the sheet and submit it in this record, but we will have it before the court for the purpose of observation when the case is finally submitted.

DEFENDANT CLOSES.

[233] DEFENDANT HAVING CLOSED ITS CASE, THEREUPON PLAINTIFF OFFERED FURTHER TESTIMONY AS FOLLOWS, TO WIT:

**Testimony of A. M. Lechman, for Plaintiff (Recalled in Rebuttal).**

A. M. LECHMAN, recalled as a witness for plaintiff, in rebuttal, testified:

Q. (Mr. BURR.) Mr. Lechman, you are familiar with the flow of water at the gage that has been referred to in this record and testimony, are you?

A. I ought to be after 10 years time on it.

Q. You have seen it every day for how many years?

A. For 10 years—this is the 10th year. The last two years my wife has been recording it, but I passed there—have to watch her to see she does it right, see she don't get mixed up.

Q. Is the water exceptionally rough there and turbid?

A. Well, in real high stages of water it will wave up and down a little, because the more water there is in there the swifter it is, it will naturally wave up and down, but as to being a whirlpool there, there is no whirlpool. Naturally wherever water runs against a timber it will waver up and down a little.

Q. Outside of that there are no ripples or eddies?

A. Not that I ever have noticed.

Q. Had there been you would have noticed them, wouldn't you?

A. If there was much of an eddy I would have noticed it, yes.

[234] Cross-examination.

Q. (Mr. GRAVES.) When you were making these readings you were not expected to go up the

(Testimony of A. M. Lechman.)

canal to see how much water was being diverted from the canal above you?

A. I don't know anything about that. I didn't go up the canal.

Q. You didn't know anything about that, you just simply stood there and read the readings?

A. Yes, sir.

Q. Read the gagings?      A. Yes.

(Witness excused.)

**Testimony of Paul Taylor, for Plaintiff (Recalled in Rebuttal).**

[235] PAUL TAYLOR, recalled as a witness for plaintiff, in rebuttal, testified:

Q. (Mr. BURR.) Above the gaging station at the Lechman ranch, Mr. Taylor, about how much land is under cultivation by means of irrigation from the defendant company's canal?

A. Well, sir, there are, I judge, between 10 and 15 acres, not over that—not over 15 acres.

Q. All told?      A. Not over 15 acres.

**Cross-examination.**

Q. (Mr. GRAVES.) Are you taking into consideration the Ellison place and the Splawn place?

A. Those places have ditches of their own. They don't take water from the West Side ditch. Between the intake to the West Side canal and Lechman's bridge there are no ditches across the railroad track; both those farms are on the other side, I believe, and there are no pumping plants.

Q. Do you mean to say that there is not any water



(Testimony of Paul Taylor.)

delivered by The West Side Irrigating Company to the Ellison and to the Splawn places?

A. I know, if you mean by the Ellison place the L. F. Ellison ranch, that you run to from the road right below Mr. Ellison's— Q. Yes.

[236] A. I have been there since 1912 and made surveys of that and those ditches, and Ellison irrigated his land then by water that was taken out from a slough.

Redirect Examination.

Q. (Mr. BURR.) Between the head of the ditch and the gage there is no diversion then for more than 10 or 15 acres?

A. No, sir. The West Side people use some sort of measuring-box that they take their water out from, and there are no measuring-boxes above Gordon's flume.

Q. (Mr. GRAVES.) Do you know Mr. Bruton's place? A. Mr. Bruton?

Q. Mr. W. D. Bruton?

A. No, I don't. I believe though that is a place just above the ditch, is it not?

Q. Yes. The place that used to belong to C. A. Splawn.

A. There is no diversion—no pumping from the ditch and that is what they would have to do to get it on the up-stream side.

(Witness excused.)

Mr. BURR.—That is all.

And thereupon plaintiff and defendant rested and the testimony closed.

[237] United States of America,  
Eastern District of Washington,  
Southern Division,—ss.

I, Chas. B. Eaton, heretofore and on the 17th day of September, 1913, by this court duly appointed special examiner in the foregoing entitled action, now pending in said court, to take the testimony and proofs of the respective parties thereto and report the same to the court,

DO HEREBY CERTIFY AND REPORT, that being attended by the solicitors for the respective parties, at the Federal Building, in the city of North Yakima, Washington, at the hour of 10 o'clock A. M. the 1st day of July, 1914, I proceeded to take the testimony and proofs of the respective witnesses produced before me by said parties and each of them.

That the foregoing and annexed depositions of the witnesses E. I. Anderson, Frank Herke, A. M. Lechman, Margaret Lechman, Thomas Lechman, William C. Muldrow, T. A. Noble, F. J. Page, Paul Taylor, A. J. Splawn, C. K. Tiffany and J. C. Yearwood, on behalf of plaintiff, and E. I. Anderson, J. M. Burch, Lewis G. Ellison, Carroll B. Graves, Jeff H. Lee, H. G. McNeal, Burt Pease, Mitchell Stevens and W. A. Stevens on behalf of defendant, were taken before me, at North Yakima and Ellensburg, Washington, within said District, on the 1st and 2d days of July, 1914, and the 22d and 23d days of March, 1915.

That each of said witnesses, before examination, was by me cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, and then

orally examined by the solicitors for the respective parties; that said testimony and proofs and depositions were by me reduced to writing, in shorthand, in the presence of the witness testifying [238] and the solicitors for the respective parties, and thereafter transcribed by me and under my direction; that the annexed transcript, depositions and record, consisting of 236 typewritten pages, is a full, accurate and complete transcript of my shorthand notes, taken as aforesaid, and contains and embraces all the testimony, depositions, proofs and proceedings had before me in said cause as such special examiner, and contains and embraces all the testimony and proofs offered or produced before me in said cause, and all objections to the admission of testimony, offers to prove, motions to strike and stipulations and admissions.

That the reading of the depositions to or by the respective witnesses, and their signatures thereto, were by the parties hereto, by their respective solicitors, expressly waived.

That during the taking of said depositions and proofs exhibits were offered in evidence by plaintiff as follows: "A" to "P," both inclusive, and by defendant "1" to "4," both inclusive, which exhibits, properly identified and marked, are returned and filed herewith.

That I am not related by blood or marriage to either of the parties hereto, am not attorney or counselor for either of them, and am not interested, directly or indirectly, in the result of this action nor in the subject matter thereof.

Dated, North Yakima, Washington, June 19, 1915.

Respectfully submitted,

(Signed) CHAS. B. EATON,

Special Examiner.

[Endorsed]: Filed in the U. S. District Court,  
Eastern District of Washington. Jul. 10, 1915.  
Wm. H. Hare, Clerk. (Sgd.) Edward E. Cleaver,  
Deputy.

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[Endorsed]: No. 2866. United States Circuit  
Court of Appeals for the Ninth Circuit. The West  
Side Irrigating Company, a Corporation, Appellant,  
vs. The United States of America, Appellee. Tran-  
script of Record. Upon Appeal from the United  
States District Court for the Eastern District of  
Washington, Southern Division.

Filed October 9, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

2

THE WEST SIDE IRRIGATING  
COMPANY, a Corporation,

*Appellant,*

vs.

THE UNITED STATES OF  
AMERICA,

*Appellee.*

No. 2866.

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## BRIEF OF APPELLEE

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION.

FRANCIS A. GARRECHT,

United States Attorney,

Spokane, Washington.

E. W. BURR,

Special Assistant to U. S. Attorney,

*Attorneys for Appellee.*

**Filed**

AUG 20 1917

D. Monckton,  
Clerk.



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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE WEST SIDE IRRIGATING  
COMPANY, a Corporation,

*Appellant,*

vs.

THE UNITED STATES OF  
AMERICA,

*Appellee.*

No. 2866.

## PRELIMINARY STATEMENT

By stipulation it is established that in 1905 an effort was being made to have the Secretary of the Interior undertake the Yakima Reclamation Project. (Record, page 58.)

The legislature of the State of Washington passed an act approved March 4, 1905 (L. 1905, p. 180), "Relative to the use of state waters for irrigation purposes" and granting to the United States the right to exercise the power of eminent domain in acquiring lands, water and other property. Pursuant thereto

the United States on May 10, 1905, filed in the office of the Commissioner of Public Lands of the State of Washington, a notice of withdrawal of the unappropriated waters of the Yakima River and its tributaries. (R., p. 58.)

On December 12, 1905, the Secretary of the Interior notified the Geological Survey, then in charge of the work of the Reclamation Service, of the conditions required to be met as a pre-requisite to the construction of the Yakima Project. (R. 59.) These were re-stated in the letter to Congressman (now Senator) W. L. Jones, which is "Plaintiff's Exhibit 1."

Among said conditions were the following:

"First. The adjustment of all conflicting claims of those who are appropriating water from the Yakima River or any other body of water, for irrigation, power or any other purpose.

"Second. The determination of all suits now pending to prevent the diversion of water from the Yakima River to the Yakima Indian Reservation, and any and all other litigation that in any way tends to embarrass or restrict the appropriation of the waters from said river or any other body of water needed for the irrigation of the lands under said proposed projects."

At this time water litigation was pending. (R., p. 202.) Indeed, it is conceded that as early as 1903, and since during the low water season of each year the water supply of the Yakima River was wholly exhausted. (R., p. 64.) Eliminating the stored waters, the claims perfected, partly perfectly and imperfectly, in the aggregate greatly exceeded the supply.

To adjust these conflicting claims, and permanently settle the rights of water users appeared to present a situation which inevitably would involve in litigation all claimants of water rights in the Yakima River which would include the appellant corporation.

To the Yakima water users was thus presented the alternative,—the adjustment out of court of all water rights and the construction of the Government's reclamation project with the incident expenditure of large sums of money in the valley; or the refusal of the Reclamation service to have anything to do with the Yakima Project, and extensive, costly and uncertain litigation over water rights.

Property owners in the Yakima Valley were desirous of having the project undertaken (R., p. 84.), and the Commercial Clubs appointed committees of citizens to adjust conflicting claims and secure concession of rights so that the requirements of the Government might be met. (R., pp. 82-188.)

Public meetings were held, some of which were addressed by the engineers of the Reclamation Service. The statements made by them were to the effect "that no project could be undertaken in the valley until these various appropriators had all signed an agreement, agreeing to limit their rights to such quantities of water that the total amount of all these claims as signed up, would not be more than the water which flowed in the Yakima river." (R., pp. 186-187-188-82.)

The settlement of the amount of water for insertion in the instrument was left with the committee and the water claimants and with the final negotiations the United States officials had nothing to do. (R., p. 187.)

The water users signed limiting agreements in which the maximum claim for water was specifically stated, and suits pending in court were dismissed. (R., p. 6.) Thereupon the Secretary of the Interior on March 27, 1906, authorized the construction of the Yakima project and up to the time of trial had expended thereon about \$7,420,000. (R., p. 60-61.)

These limiting agreements, some fifty in number, with the exception of the amount of water specified in the schedule, are all identical with the one executed by the appellant which is printed in the record. R., pp. 22-23.)

It is this instrument limiting appellant to eighty cubic feet of water per second of time which the Government asks the court to enforce but which appellant seeks to repudiate, or at least to have so construed as to permit it to enjoy 104.6 cubic feet, an increase of nearly one-third of the amount claimed by it at the time of the adjustment of water rights in the Yakima River.

The defendant and its stockholders received the consideration for which the agreement was executed, to-wit, freedom from litigation, the settlement of their water rights and of those of their rivals and the expenditure by the United States of millions of dollars in Kittitas County with consequent improved market conditions.



After the execution of the limiting agreement in question it appears that some of defendant's stockholders became dissatisfied with the amount which had been claimed on their behalf, and one stockholder (R., p. 191), who at the time had other business with him, stated to Mr. Noble, *whose connection with the Reclamation Service had been severed several months prior thereto*, that the company did not feel bound by the agreement. (R., p. 192.) This conversation is the only evidence in the record of any expression of dissatisfaction of the stockholders with the contract, except among themselves.

*There is not a scintilla of evidence to indicate that the dissatisfaction of any stockholder, either as an individual or in any official capacity for the defendant, was ever brought to the attention of any agent of the United States.* The assertion in appellant's brief that "the Company notified the officer who had conducted the negotiations for the government that they refused to be bound by the signed agreement," does not comport with the facts. The necessity for making such statement doubtless lies in the fact that the defense to the limiting agreement must fail, both in law and morals, on account of appellant's failure to give any notice of its disavowal of the contract until after the government in express reliance upon the good faith and validity of these limiting agreements, had expended more than \$7,000,000.

## ARGUMENT.

## A CAUSE OF ACTION STATED.

The first assignment of error argued raises the question that the complaint does not state a cause of action.

The amended complaint is sufficient and no attack upon it was made in the court below. But if it were correct that the amended complaint did "not show that the United States, or any one in privity with it, has been deprived of the use of water," or "that present injury has been caused it or any one in privity with it," the stipulation entered into at the trial has so broadened the amended complaint that all these matters are now conceded as the following quotations from the record show:

"It is stipulated (R., p. 58):

"That in pursuance of the act of the state legislature aforesaid Secretary of the Interior on March 8th, 1909, authorized the director of the Reclamation Service to "construct under the provisions of the Reclamation Act such works as may be necessary for the full utilization of the waters so withdrawn (referring to the withdrawal made as aforesaid under the act of March 4, 1905), using therefor the funds now available under allotments already made, and the funds to be made available from time to time in the future in accordance with the regular procedure established for that purpose." (R., p. 61.)

"That on September 2d and 3d, 1890, notice of appropriation in accordance with law was posted and filed for record in the office of the auditor of Yakima County by the agents of the Northern Pacific, Yakima

& Kittitas Irrigation Company to the amount of 2000 cu. ft. per second of time. Thereafter by the agents of the company an amended notice of appropriation dated March 23, 1891, was duly made for 1000 cu. ft. per second of time. That thereafter by mesne conveyances the water appropriation so made, together with an appropriation initiated prior thereto by the Kennewick Ditch Company for 54 cu. ft. of water per second of time passed to the Washington Irrigation Company." (R., p. 61-62.)

"That by deed dated June 23, 1906, the said Washington Irrigation Company conveyed both the said water rights to the plaintiff herein, said deed being recorded August 29, 1906, Vol. 47 of Deeds, at page 586, records of Yakima County.

That the said appropriation of 54 cubic feet per second on the part of the Kennewick Ditch Co. and that of the Washington Irrigation Co. for 1,000 cubic feet per second were, prior to the said transfer to the United States, consummated by beneficial use, the former water-right in the entirety and the latter to the extent of approximately 650 cubic feet per second and by the irrigation of large bodies or irrigable land under canal of the Washington Irrigation Co. known as the Sunnyside Canal, appurtenant to approximately 40,000 acres of land. (R., p. 62.)

"That following out the withdrawal of the waters aforesaid the United States has constructed irrigation systems for the beneficial use of water from 90,000 acres upon the Sunnyside unit and 34,500 acres upon the Tieton unit of the Yakima project and is engaged upon the construction of additional portions of the Sunnyside unit, which, when completed, will increase the area of said unit to 102,000 acres approximately. The United States has furthermore entered into a contract with the irrigation district known as the Kittitas Reclamation District and agreed upon certain conditions contained in said contract to furnish water from the natural flow of the Yakima River from storage reservoirs constructed and to be constructed upon the headwaters of the Yakima River." (R., p. 63.)

"That defendant has its point of diversion above the points of diversion for the plaintiff's Sunnyside and Wapato canals." \* \* \*

"That the plaintiff is able and plans to make use of the natural flow existing in the Yakima River during normal years, except during periods of exceptional and brief high water subsequent in each year to May 1. That the amount of stored water which plaintiff is able to secure from its Bumping Lake and Kachees reservoirs already constructed, from its Keechelus reservoir now under construction and from its proposed Cle Elum and McAllister's Meadows reservoirs is 1,082,000 acre-feet from which an estimated annual draft of 1,000,000 acre-feet can be made, and in order to irrigate the aforesaid area of 500,000 acres the plaintiff plans to utilize from the natural flow of the Yakima river prior to July 1, in each year 1,000,000 acre-feet from the natural flow of the Yakima river and its tributaries. (R., p. 64.)

## RIGHT OF THE UNITED STATES TO PRO- TECT ITS INTERESTS IN THE YAKIMA RIVER BY AN INJUNCTION SUIT IS BEYOND QUESTION.

By the second, third, fourth and fifth assignments of error it is contended that the United States had no authority to maintain this suit.

Appellant cites but one case as an authority, *in re Celestine*, 114 Fed., p. 551.

A careful reading of this case will disclose that it has no bearing on the point discussed. That case merely held that an Indian agent could not of his own volition assume authority to maintain a suit for a writ of habeas corpus.



Indeed the opinion of the court in that very case throws doubt upon the position taken by appellant here.

It reads page 552:

"I am not prepared to say that the government cannot do such a thing if it should be necessary in any case in order to prevent a failure of justice."

Manifestly some one must have the power and authority to protect the rights of the government and those claiming under it. The water users on the Yakima project whose rights are incomplete could not, and by the federal statutes the duty is put upon the Secretary of the Interior.

"No such right (right to use water) shall permanently attach until all payments therefor are made."

Part of Sec. 5, Act of June 17, 1902, 32 Stat. L. 388.

Also from Sec. 6, *Ibid*—

"Provided title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

Again by Sec. 1, of Act of June 25, 1910 (36 Stat. L. 835); Vol. 1—1912 Sup. Fed. State. An., p. 414. Advances by the Secretary of the Treasury to the Secretary of the Interior for the "reclamation fund" are authorized for sundry purposes, among which are such "as he (Secretary of Interior) may deem proper and necessary to the successful and profitable operation and maintenance thereof *or to protect water rights pertaining thereto claimed by the United States.*

This point also was not urged in the court below, perhaps because it had already held adversely to any such contention.

In the *United States vs. Union Gap Irr. Co.*, 209 Fed. R., p. 276, the Court said:

"The right of the plaintiff to maintain this suit is beyond question. Aside from any rights it may have acquired under the legislative act of 1905, it acquired by purchase from the Washington Irrigation Company, on the 23d day of June, 1906, the Sunnyside Canal, having its intake below Union Gap in Yakima county, together with an appropriation of 1,000 cubic feet of water per second of time, made by the Northern Pacific, Yakima & Kittitas Irrigation Company on the 22d day of April, 1891, and it has a manifest right to protect this appropriation and the rights acquired thereunder by injunction. It further appears from the testimony, to my satisfaction, that for a number of years last past, during the months of July, August and September, there has been a shortage of water in the river at the intake of the Sunnyside Canal, so that the government and its predecessor in interest could not avail themselves of the full amount of their appropriation, or if all the water to which they were entitled. This fact is so notorious that the court might perhaps take judicial notice of it, but in any event it is fully supported by the testimony."

It is stipulated (R., p. 63): "That the defendant has its point of diversion above the point of diversion for the plaintiff's Sunnyside and Wapato canals", which makes the case cited exactly in point.

ACT OF TRUSTEES BINDING ON  
APPELLANT.

APPLICATION OF DOCTRINE OF ESTOPPEL.

The fundamental legal doctrine determinative of the controversy seems not to be seriously disputed.

It is stated in appellant's brief that "ultra vires acts of directors do not bind the corporation or stockholder unless ratified, or unless circumstances of *equitable estoppel* exist."

Upon this statement of the law taken in connection with the undisputed facts in the record we could well rest this case.

There is an absolute failure to show any timely repudiation of the act of the officers of the defendant corporation in executing the agreement. After the government has expended large sums of money, repudiation now comes too late.

The stockholders of the West Side Irrigating Company had previously permitted its trustees to exercise like powers, not merely to compromise their rights to avoid a law suit, or to enhance its material interests, as by the agreement in this case; but actually to hypothecate the canal and water rights. Mortgages covering these rights (plaintiff's exhibit M and N) were entered into by the trustees without special authorization by the stockholders and the debts were honored and liquidated.

The following from the by-laws of the company vested such power in the trustees:

"The trustees shall make all regulations for distributing water and regulate the charge for the same."

"The trustees shall have full power to \* \* \* enter into contracts for the sale of water." (R., p. 163.)

Other instances of the trustees exercising like powers are evidenced by the agreements with Ellison and Splawn (Plaintiff's exhibit L, and Defendant's exhibit 4).

It is a familiar principle that where a corporation permits a certain agent to exercise powers of a given character, it is estopped from denying those powers. (10 Cyc. 1066.)

If, however, it were conceded that the directors acted beyond their powers in this instance, the corporation would nevertheless be bound unless it had made timely repudiation of its agents acts before the other party to the agreement had irrevocably changed its status.

The shareholders knew that the agreement had been signed but gave no notice of any repudiation of it to any agent of the United States.

This knowledge of the stockholders as to the nature of the agreement, prior, simultaneously and immediately subsequent to the execution of the instrument is manifest throughout the record.

Six months before the instrument was signed, the shareholders had under consideration the question of making such an agreement and passed a resolution on



the subject (R., p. 281). The stockholders voted with regard to the matter on December 21, 1905, and again on January 22, 1906. (R., p. 233.)

They then appeared dissatisfied with the agreement which had been made and in 1906 obtained legal advise (R., p. 171), and since that time have been acting under the advise of counsel. (R., p. 148.) Every witness for the defense who referred to the agreement testified to his knowledge of the matter.

It would have been easy, at the time mentioned, to have brought home to the officers or agents of the Federal Government that the shareholders of the corporation repudiated this agreement, and at a time when the United States could have withdrawn from the proposed project without any loss, other than the preliminary investigation, or could have postponed action pending settlement of the rights to water from the Yakima River, as the project was not authorized until March, 1906.

Thompson writing in Cyc., p. 1076, makes the following statement pertinent to the case at bar:

## RATIFICATION BY ACTS AND NEGLECTS IN PAIS.

a. BY ACQUIESCENCE AFTER KNOWLEDGE. Acquiescence for a considerable time by a corporation, through its efficient agencies and the body of its shareholders, in a state of facts, after knowledge or after such a length of time and such a condition of circumstances that knowledge is to be inferred, will operate as

a ratification in pursuance of the well-settled principle in the law of agency that a principal may ratify the unauthorized act of his agent by acquiescence or even by silence, after being fully informed of the facts and circumstances attending the unauthorized act. This rule applies where the principal is a corporation, provided the unauthorized act of the agent is within the powers of the corporation.

b. BY FAILING TO DISAVOW PROMPTLY AFTER KNOWLEDGE. An intensified expression of the doctrine of the preceding paragraph is to say that where an agent has done an act not authorized by his principal, if the principal would disaffirm he must act at once upon obtaining knowledge of the unauthorized act.

c. BY FAILING TO DISSENT WITHIN REASONABLE TIME—In General. The meaning of the preceding paragraph is that the corporation must dissent with reasonable promptness, or within a reasonable time, or as soon as it may be reasonably done after acquiring knowledge of the unauthorized act.

“A person is held to a \* \* \* position assumed, where otherwise inequitable considerations would result to another who, having the right to do so under all the circumstances of the case, has in good faith relied thereon. Such an estoppel is founded on morality and justice and especially concerns conscience and equity.”

10 R. C. L., Sec. 19, pp. 689, 691.

“Ratification may also be implied, or the corporation be held estopped to deny ratification, from acquiescence on the part of the corporation. When the officers or agents of a corporation exceed their powers in entering into contracts or doing other acts, *the corporation, when it has knowledge thereof, must promptly disaffirm the contract or act, and not allow the other party or third persons to act in the belief that it was authorized or has been ratified.* If it acquiesces, with knowledge of the facts, or fails to disaffirm, a ratification will be implied, or else *it will be estopped to deny a ratification.*”

*Clark v. Marshall on Corporations*, p. 2188-9, and numerous cases cited.

The same doctrine has frequently been laid down by the supreme court of the United States and in the case of Indianapolis Rolling Mill vs. St. Louis, Etc., Railroad, 120 U. S., 256, it was held that two years was too long a period to delay disaffirmance of a contract executed by an agent of the corporation. The court quotes from the case of *Twin-Lick Oil Co. vs. Marbury*, 91 U. S. 592, the following:

"The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction, as soon as it may be reasonably done, after the party, with whom that right is optional, is aware of the facts which gave him that option, are numerous. \* \* \* The more important are as follows: *Badger v. Badger*, 2 Wall 87; *Harwood v. R. R. Co.*, id. 78; *Marsh v. Whitmore*, 21 id. 178; *Vigers v. Pike*, 8 Cl. & Fin. 650; *Wentworth v. Lloyd*, 32 Bev. 467; *Follansbee v. Kilbreth*, 17 Ill. 522; S. C. 65 Am. Dec. 691." (p. 260.)

## RIGHTS OF WIVES.

There was no showing that any rights of married women were involved in this litigation. Such suggestion and argument being made for the first time in the assignments of error and brief on appeal. But should there have been such, the doctrine of estoppel would apply to women stockholders or the wives of stockholders with like effect as to the men.

“And with respect to the ownership or interest in land it has been held that a married woman may be estopped to assert her rights therein where she has long acquiesced in a contract or transaction affecting it.”

10 R. C. L., Sec. 64, p. 746.

## CONTINUED USE OF WATER BY IRRIGATING COMPANY NO DISAVOWAL OF THE CONTRACT.

The continued use of the water by the defendant corporation, if such use continued, was no disavowal of the contract whatsoever. The right to the diversion and use of water is uniformly held to be real property.

2 *Kinney on Irrigation*, 2nd E., p. 1328, Sec. 769.

The settlement effected by this series of limiting agreements divided the entire existing low water flow, and is subject to the same principles as a settlement of land boundaries. When settlement of land titles is made between owners rectifying their lines no period of adverse possession thereafter short of the statutory period would suffice.

The courts of this state hold that prescriptive title to water can only be secured by continuous, uninterrupted and adverse possession of the water for the ten-year period fixed by statute for adverse possession of land.

*Spring Hill Irr. Co. vs. Lake Irr. Co.*, 42 Wash. 379, 383;

*Allen vs. Roseberg*, 70 Wash. 422, 426;

*Barnes v. Belsaas*, 73 Wash. 205.



## AS TO ABANDONMENT.

Nor can appellant escape the operation of the doctrines of estoppel and implied ratification upon the theory that there was no intent to abandon or relinquish any rights, or that abandonment will not be presumed but must be clearly shown.

A casual inspection of the authorities cited for the defendant in this connection shows their utter inapplicability to the present situation. They relate to an abandonment not predicated upon any written instrument. In the present case the intent was reduced to writing and it is not possible for defendant to set up an intent contrary to the terms of the instrument after vast sums have been expended in reliance thereupon.

The language of the instrument is plain and unambiguous, among other things it recites:

"Whereas, no irrigation project to be undertaken by the United States within the said watershed can be recommended as feasible unless the quantity of water to which each present user from the Yakima River and its tributaries is entitled *be first definitely ascertained and agreed to*, and, whereas, the undersigned claim certain quantities of water from the Yakima River and its tributaries and are *willing to limit* their claim to the said waters to the quantities of water designated in the following schedule." (Italics inserted.)

"Now, therefore, in order to avoid litigation, to encourage the storage of water in the Yakima watershed and to secure the indirect benefit derived from further irrigation through Federal enterprise, each subscriber to this agreement or to a copy thereof, differing only as to the quantities of water specified, agreed to limit

and does limit its respective rights of appropriation from said Yakima River and its tributaries to the above specified amounts, provided, that it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise, in order to secure the benefits above referred to." \* \* \*

The terms of the instrument are clear and they call for the reduction of any claims the defendant company may have had to divert from the Yakima river to a maximum figure of 80 c. f. s. The intent to limit the claim of the defendant cannot now be disputed. There is no ambiguity, no possible ground for misinterpretation and whether the intent be designated one to abandon, to relinquish, to limit or to define is immaterial. The appellant intended to induce the United States to construct irrigation works in the Yakima Valley, and intended to induce rival appropriators to forego disastrous litigation and agree to set a limit upon their own rights. Appellant cannot now even plausibly urge that it did not know the nature of its act. (R., p. 135.)

The contention that the flow of water should be measured at the scores of farm headgates deserves no more than passing notice. Such a construction would deprive the United States of both the certainty as to claims and the freedom from litigation, stated to be the consideration for those instruments. If the government accepted contracts of this character they undertook to police all the canals diverting from the entire Yakima river.

## THE DEFENSE OF MISTAKE.

The appellant contends that the relief should be denied on the ground that it made a mistake in fixing 80 cubic feet as its limit of right.

Our reply is threefold:

(a) Such a mistake if made is not now available since it was proved by defendant's own testimony, that its stockholders knew the limit which had been placed upon their rights shortly after the execution of the contract, and before the authorization of the federal project, and did nothing to repudiate the instrument, but rather maintained a discreet silence as regards communicating their intention to disavow the contract to the Government which was interested in the disavowal and had a legal and moral right to the information. This point has already been sufficiently discussed.

(b) The preponderance of evidence is that no mistake was made.

(c) The law requires that mistake shall be proven by clear and satisfactory proof and more than by a mere preponderance, in order that equity shall refuse to carry out a valid written instrument.

## NO MISTAKE WAS MADE.

The object of defendant when the contract was signed, *as testified by the shareholders*, was to fix upon the amounts the shareholders "had been using through

their canal" (R., p. 129). The purpose to secure "the amounts of water being used" appears numerous in defendant's evidence.

Upon the question of the amount of water used there is considerable conflict among appellant's own witnesses. Some of the stockholders and trustees claim they did not know how much water they were diverting. They had never taken any measurement of how much entered the ditch (R., p. 167). One of the leading witnesses swore positively to a diversion of 10,000 inches (R., p. 94 and 99). They did not know how to measure water (R., p. 139). One of them had never heard of miner's inch (R., p. 167).

The ideas of the farmers as to water measurement and as to the capacity of the ditch and the amounts actually diverted are exceedingly chaotic and unreliable. Courts have remarked upon this fact times without number.

"The trouble with the whole line of evidence given on this subject is that it was for all practical purposes worthless, and was not founded on any actual measurements or tests, but was purely guesswork as to the volume of water that had been used by the several witnesses."

*Farmers Co-operative Ditch Co., v. Irr. Dist.*,  
102 Pac. 481, 483.

*U. S. vs. Conrad Investment Co.*, 156 Fed.130.  
*Hough v. Porter*, 95 Pac. 752.



## ENGINEER ANDERSON'S ESTIMATES ALSO UNRELIABLE.

Anderson's observations show that the boxes were of many varieties. For example, it appears that in one case 194 "inches" equalled 4.75 cubic second feet and in another 212 inches equalled 4.57; or by simple process of division in the former case 40.8 inches equalled 1 cubic second foot and in the other 46.3 inches equalled 1 cubic second foot. (R., p. 153.) But by some process of averaging the boxes with a greater pressure with those of less, that is, apparently, the reconstructed boxes with the earlier types, he reached "an average of the measurements of all the boxes." (R., p. 153.)

Such a theoretical average box is thus described:

"The defendant's "module for the measurement of water consisted of a box, entering one side of which an orifice has been cut, the width or depth of the orifice being about four inches; the bottom of the orifice being about three inches above the bottom of the box and the top of the orifice being *five inches below* the top of the box, making the total depth of the box twelve inches." (R., p. 109.)

Mr. Anderson's testimony as to measurements made by him in 1912 does not even tend to prove what amount of water appellant was using in 1905. Before his testimony was given the following objection was interposed on behalf of the Government:

"This testimony will not be relevant or material \*  
 \* \* it could not be relevant under the pleadings unless defendants were first entitled to show that there was a mistake at the time the agreement was entered into between the Government and the West Side Irrigation Company, and our contention is that under these pleadings the defendant company cannot question the terms of that written agreement because they are clearly stated in the agreement; and there is no allegation of fraud and the terms are not ambiguous, but are clear." (R., p. 110.)

Anderson's testimony is also unsupported by the ditch rider and would be incompetent for the same reason which counsel for defendant urged against the Government report (plaintiff's exhibit "E"), which was:

"MR. GRAVES. I object to it on the ground that it is wholly incompetent; that there is no statement here as to the method of measurement and there is no statement by any person who took the measurements and that these readings are objected to unless there is accompanied with them the oath of the party who made the measurements." (R., p. 174.)

To obviate Mr. Graves' objection the individuals who actually made the readings and put down the figures in the report were brought in and gave testimony as to their accuracy, but Mr. Anderson's testimony was not supplemented by the oath of the ditch rider, who was the determining factor as to the comparative correctness of Anderson's water measurements.

This is clear from Anderson's testimony:

A. "Now, relative to the pressure and the miner's inch, I determined this inch was as follows. The ma-

nipulation of the box, that is, the pressure over the box, was carried on by the ditch rider and in the same manner and without any suggestion on my part—as to that my instructions simply was to him in this box I selected for calibrating was to turn it in that box as he was accustomed to measure it out in the distribution of the water throughout the canal.” (R., p. 154.)

As to whether or not this ditch rider honestly and correctly followed instructions and turned the water into the box selected by Anderson “as he was accustomed to measure it out in the distribution of the water throughout the canal” there is a fatal failure of proof.

Although Mr. Anderson’s testimony as to the module of measurement in 1912 is without value as to what conditions were in 1905. It is still interesting to note that the boxes in 1912 measured five inches from the top of the orifice to the top of the box. (R., p. 109.)

Whereas, in 1909 a resolution on the company’s minutes declares that the canal “*has been enlarged until it safely carries 5000 miners inches of water, measured under 4½ inch pressure.*” Evidently the pressure unit was enlarging through the years as well as the number of inches claimed. Considering all the evidence it is almost conclusive that in 1905 the 4000 inches as then measured and understood by all parties equalled 80 cubic feet.

As bearing on the relative value of the evidence introduced by the Government and the appellant corporation as to the amount of water diverted from the stream into the irrigating canal of corporation, and to

further accentuate the contrast, attention is again invited to the transcript of the testimony.

Mr. Noble, District Engineer for the United States Reclamation Service in 1904 and 1905, testified (R., p. 189):

"The total quantity of water diverted from the river as measured by the representatives of the Reclamation Service that had certain gauging stations, one on each canal, and the quantity of water was determined at these gauging stations. Those gauging stations generally were as near the head of the canal as the conditions would permit. In selecting a gauging station it is necessary to select a place where the conditions are favorable to get an accurate measurement."

Again on page 193:

"In 1904, 1905 and 1906 you have charge of the Government work with reference to those streams?

A. I did, yes, sir.

Q. Did you know at that time how much water was being diverted by the West Side Irrigating company?

A. Yes, sir.

Q. Could you state how much it was?

A. Yes, sir." \* \* \*

Q. Then you may state what it was that they diverted.

A. In 1904 it was a trifle less than 70 cubic feet per second was the maximum amount, as shown by records of gauge height in the canal at the station; in 1905 it was very close to 75 cubic feet per second."

In addition to this Mitchell Stevens, who was the Vice President of the appellant corporation at the time, and who signed in its behalf the limiting agreement involved in this action, testified that he knew that the government was actually engaged in measuring the



amount of water being diverted into the West Side Irrigating company's canal. The following is from his testimony (R., p. 264):

Q. "When did you see this water gage there on the bridge—1903?

A. No, I didn't see it till 1905.

Q. Well, you saw it there in 1905. During the summer?

A. Yes, sir.

Q. You knew what it was?

A. Oh, yes.

Q. Did you know why it was there?

A. Yes.

Q. You knew that the Government was making an estimate of what water was going into these various ditches?

A. Well, that was my understanding. I understood so."

After this and on the 21st day of October, 1905, he signed the limiting agreement for the company.

The hydrographic measurements taken by the Geological Survey (Plaintiff's Exhibit E, I, P, K) and the minutes of appellant corporation (R., p. 234, 150) all point to the conclusion that at the time of the signing of the limiting agreement and prior thereto, there was less, rather than more, water diverted into defendant's ditch than was fixed by the schedule stated in the instrument.

## WATER MEASUREMENTS ON MANASHTASH CREEK.

The method of measurement is stated several times in the record to have been that in vogue on the Manashtash Creek in Kittitas county and embodied in the Manashtash decree in the case of Gray et al. v. Johnson et al (R., p. 88, 97, 140), and in defendant's brief (p. 36) occurs the following statement:

"The government knew because it was doing business through skilled engineers, that after making allowance for seepage a diversion at the intake of the canal of 80 second feet of water would supply the land of the users of water from the canal less than one-half an inch per acre, and that the hay and grain lands of that valley could not be profitably farmed with that volume of water, and that every decree rendered in that valley in the last quarter of a century has given and permitted the use of one inch per acre as being needful." (R., p. 36.)

As no evidence appears in the record to indicate exactly what these decrees contain it was doubtless assumed by defendant's counsel that the trial judge who formerly presided over the Superior Court in the Yakima district would judicially notice their contents as matter of history.

From an examination of the proceedings and decrees referred to in the evidence and upon the argument, and notice by Judge Rudkin in his opinion the excerpts of which are appended to this brief it appears that appellant was seriously in error in assuming that the

Manashtash decree sustained the contention of the stockholders in this case; and that counsel's above statement both as to the methods of measurement and the duty of water is equally in error.

If we take appellant's shareholders at their word—that the company's claim in 1905 was 4000 inches as defined in the Manashtash decree we find the government position fully sustained and the estimates of Engineer Anderson completely upset.

The "Manashtash" decree recites:

"That by an inch of water wherever mentioned in this decree, is meant the amount of water which constantly flows through an opening one inch square through a plank one inch thick in the side of a box in which still water is maintained at a constant depth of *four inches above* the top of the opening."

Four thousand inches of water according to this measurement under the given four-inch pressure would not equal 90.4 ~~second~~ feet, the amount contended for by appellant and argued for by Engineer Anderson under an assumed *five-inch* pressure (R., p. 109), but equals approximately 80 second feet, just as appellant's attorney, Judge Kauffman, told the shareholders it would (R., p. 129) and as stated to them by Mr. Noble (R., p. 200) and correctly set forth in the instrument.

In view of the rule actually established by the Manashtash decree, which was the measure which defendant's stockholders claim they adopted, it would appear that Mr. Noble's statement of the equivalents in 1905 was entirely within the facts and the intimation of

bad faith or that he purposely misled the shareholders is without foundation.

It needs no argument to show that more water ran under the five-inch pressure in vogue in 1912 than under the four-inch pressure as of the Manashtash decree used in 1905.

## ENLARGEMENTS.

Defendant began its work in 1889 with a contract to Clinesmith & Clerf. The leading witness for defense testifies that the contractors went "broke and finally threw up the contract", not having made a workable ditch. (R., p. 92.) They had failed to finish the canal (R., p. 268). A number of years went by and the company "had completed the ditch in a way" probably about 1900 (R., p. 93), but the canal was not built to carry anything like the company's present amount (R., p. 100). The company is stated to have "continuously and diligently increased its diversions and use of water upon lands in West Kittitas valley". (R., p. 94.) "They increased as fast as they were able to get water to irrigate with and run the ditch and kept increasing it". (R., p. 94.)

On August 23, 1902, the stockholders met, increased the stock to \$40,000 and voted to make a "*ditch large enough to carry 3500 inches of water*". (See resolution R., p. 234.) "In 1903 and 1904 Sharp, Bradshaw and Coleman enlarged that ditch." (Mitchell Stevens, R., p. 183.)



Again in 1909 there was comprehensive work done on the canal which witnesses for defense try to explain as merely a cleaning out of the ditch, which witnesses for the United States, some of them, evidently reluctant on account of having to live near the stockholders of defendant, show it to have been an enlargement by widening and deepening. (R., p. 215; p. 216; p. 236; p. 244.)

Accordingly it was recited in stockholders' resolution of December 4, 1909:

"The canal has been enlarged until it safely carries 5000 miners inches of water, measured under four and one-half inch pressure, said measurement being made at the several points of diversion of the laterals from the main canal." (R., p. 150.)

This is admittedly an increase of claim since their contention throughout the record and pleadings is that the company has always claimed 4000 inches.

The figures of the Geological Survey come with convincing force. These measurements taken by men whose lifework is that of hydrography, are not subject to the slightest impeachment. These figures show (Plff's. Exs. E, I, P and K) that in 1904 and 1905 the defendant on no single day was running water equal to 80 feet to which the defendant limited itself, the average during the height of the season being 65 to 75 feet. Witnesses were brought from as far as Georgia to prove the accuracy of the measurements taken. Counsel stipulated, however, that the other experts would agree with witness Muldrow that while the

figures were not of the highest accuracy (there being no recording device for continuous measurement), yet that they could be relied upon to within 2% or 3% of correctness. (R., p. 211.) This was corroborated. (R., p. 249.)

There was some attempt made to explain away the official figures and so prove a larger user in 1904 and 1905 than was shown by the Geological Survey measurements. But the effort did not go to the extent of proving that defendant was not diverted its full capacity, but rather that occasionally the ditch was broken and not running full on account of repair work being done. The following testimony of Mr. Stevens refers to 1904 and 1905:

"Q. And you were carrying about the same amount of water during all those years except during the time when you had these break-outs?"

"A. Yes, sir, I think so." (R., p. 263.)

This is clear confirmation of the official record. For example, plaintiff's exhibit P shows that about mid-August, 1905, defendant regularly carried 70.5 second feet. Then the stockholders became ambitious and tried to crowd their recently enlarged canal to a run of 77 feet. The ditch broke and the next day there was no water running. Then they repaired it in part and ran 46 feet on August 20, 53 feet the following day, and then ran again at 70 feet. *Thus the narration of defendant's witnesses as to trouble with the canal confirms the accuracy of the hydrographers' work.*

All attempts to undermine the substantial accuracy of the measurements utterly failed. They were not only not discredited by Mr. Anderson, engineer for defendant, but he relied upon them. (R., p. 179.) Moreover, in the verified answer and in the answer to the amended complaint, it is alleged as follows:

“That from time to time thereafter, and with reasonable diligence, the irrigated and cultivated area of said *lands was extended*, and the diversion of the waters of said Yakima River was increased, and the water so diverted was applied to the beneficial irrigation of said lands. \* \* \* That the defendant in order to divert, carry and conserve all the water to which its shareholders were entitled, was at the time of the execution of the so-called agreement engaged in, *and has since completed, certain betterments and enlargements of its canal*, all of which work was done for the purpose of completing the appropriation and delivering to the lands of said shareholders the full amounts of water to which they were entitled from the flow of said Yakima River.”

It is fundamental that allegations set up in an answer are evidence against the defendant. (16 Cyc., 968.) Such admissions have frequently been held to be conclusive. O. R. & N. Co. vs. Dacres, 1 Wash. 201.

In view of the admissions of Messrs. Stevens, the answer, the official measurements, the resolutions of the corporation and the Manashtash decree, we submit that the preponderance of the evidence shows that the defendant was diverting and using less than the 80 cubic feet of water in 1905.

If the intent, as above recited, was to fix in the agreement the amount of water which they had used

in 1905, they secured their aim with allowance for error, emergency or further development.

*Preponderance of Proof of Mistake Is Insufficient.*

A heavy burden of proof is laid upon appellant to prove mistake which it has utterly failed to sustain.

*"To establish mistake, the party alleging it must prove it clearly and satisfactorily, and perhaps beyond a reasonable doubt; at any rate a mere preponderance of evidence is not sufficient. The written instrument deliberately prepared and executed is evidence of the highest character, and will be presumed to express the intention of the parties to it, unless the contrary appears in the most satisfactory manner."* 9 Cyc. 393.

In a Missouri case turning upon this doctrine it was said:

*"There should not only be clear and unequivocal evidence, but there should be no room for reasonable doubt as to the facts relied on."*

*Worley v. Dryden*, 57 Mo. 226; 233.

See also

*Phillips v. Port Townsend Etc.*, 8 Wash. 529.

## WOULD THE ENFORCEMENT OF THE CONTRACT BE UNCONSCIONABLE?

Even if there had been a mistake made in the sense that the shareholders did not secure as large an amount of water as they thought, the contract should not be set aside unless the enforcement would prove inequita-



ble and unconscionable toward the defendant. The argument of appellant on this point cannot prevail.

The contract was neither harsh nor inequitable for the following cogent reasons, any one of which would suffice plaintiff:

(a) The defendant in claiming 80 cubic feet and in being permitted to divert this amount has received more than it was entitled to in 1905.

(b) The amount of water secured will amply suffice defendant's shareholders for their lands.

(c) Defendant's want of good faith in its failure to annul the contract, whereby the United States was induced to expend vast sums of money is so inequitable as to estop it, both in law and good morals, from asking to be relieved from its obligation.

(d) The rights of others, and particularly of the Government, have intervened and the agreement of defendant has been acted upon for almost ten years. The harsh and inequitable results to those who had a legal and moral right to rely upon this contract vastly outweigh any inconvenience to defendant.

It should be noted that *if our position is sound upon any one of the foregoing assertions the argument that enforcement of the contract would be inequitable falls and with it the entire defense.*

The Government stands upon the limiting agreement and cannot reduce the amount specified therein, and in combatting the contention that a greivous hardship will result to appellant urges the facts, fully borne out by the record, that defendant received more by the settle-

ment of 1905 than could have been secured to it by an adjudication.

*The Limitation Was a Generous Allowance Under the Law.*

The entire flow of the Yakima river had been put to actual irrigation as early as 1903. (R., p. 64.) In 1905 it had become a shortage and a legal fight was on. (R., p. 59.) The valid appropriations far exceeded the user. Among others, the appropriations purchased by the United States amounted to 1054 cubic feet, while its use was 650 feet. Defendant had recently enlarged so as to divert about 65 to 70 feet.

It is admitted that the defendant corporation failed to make an appropriation of water by compliance with Sec. 6317 of the Code. The following two sections of Remington & Ballinger's Code of Washington are applicable:

"Sec. 6319. By a strict compliance to the above rules the appropriator's rights to the use of the water actually stored or diverted relates back to the time the notice was posted; but a failure to comply therewith deprives the appropriator of the right to the use of the water as against a subsequent appropriator who faithfully complies with the same."

"Sec. 6320. Persons who have heretofore appropriated water, and have not constructed works or have not diverted the water and applied it to some purpose, as herein stated, must, within thirty days after this act takes effect, proceed as in this chapter provided, or their right ceases."

*Remington & Ballinger's Code, Sec. 6319, 6320.*

Such being the case, what was defendant's status before the law in 1905 and how far would the doctrine of relation have been invoked in its favor? This question is particularly pertinent in view of the fact that there were appropriators, of whom the United States was one, who had complied with the law as regards the filing of an appropriation.

"It is also the universal rule of law upon the subject that by not posting or recording a notice, or the posting or recording of a faulty notice, the appropriator loses his right to apply the doctrine of relation, from the time of the actual application of the water to some useful purpose back to the date of the posting of his notice, and he thus fails to shut off the rights of intervening claimants who have complied with the statute in this respect, and, therefore, his own rights to the use of the water should there not be ample for all, may be cut off by those who have strictly complied with the statute. *For the rule is that where an appropriator of water does not post and file for record his notice of appropriation as provided by law, his right dates only from the last act perfecting such appropriation, which, as we shall see in a subsequent section, is the actual application of the water claimed to some beneficial use or purpose.*" Kinney on Irrigation (2nd Ed.), p. 1262.

A similar statement of the law is made by Wiel on Water Rights in Western States, page 405.

The Idaho court held as follows:

"It is not shown that a location notice of water right was filed or posted as required by law, and for that reason, if appellant is entitled to any water, under said evidence, it would only date from its actual application to said land."

*Pike v. Burnside*, 69 Pac. (Idaho), 477, 478;

Similarly

*Murray v. Tingley*, 50 Pac. (Mont.), 723, 725.

The State of Washington adheres to the same rule, and in case of failure to comply with the appropriation statute the right relates back to the application to beneficial use and not to the initiation of the enterprise.

In the case of State *ex rel* Ham, Yearsley, Etc. vs. Superior Court, 70 Wash. 442, 462, the court, after quoting the appropriation statutes, says:

"It is plain from these provisions that no acts or work looking to an appropriation of water will cause the completed appropriation to relate back to the time of its actual accomplishment, except the posting and recording of appropriation notice be done as provided by Sec. 6317. \* \* \* It is provided by Sec. 6319 that a failure to comply with the rules prescribed by these sections, 'deprives the appropriator of the right to use the water as against a subsequent appropriator who faithfully complies with the same.' It evidently is the legislative intent that such an appropriator will not lose his right of appropriation by mere want of diligence short of an abandonment of his claim, except as against a subsequent appropriator who complies with the provisions of these sections; and it is apparent there cannot be such an appropriator except it be one who causes to be posted notice of appropriation, *or, possibly, one who has made a completed physical appropriation of the water.*" (P. 462.)

The rule under discussion is carefully to be distinguished from cases like Kendall vs. Joyce, 48 Wash. 489, where full use is made before the passage of the act requiring posting and filing of notices and where the right relates back to the beginning of the work.

What then was the measure of the defendant's rights October, 1905?



It is admitted that the filing for the Sunnyside main canal was made in 1891 and beneficial use was made by the United States and its predecessors to the extent of 650 feet in 1905. The rule to be invoked, as regards beneficial use by the Government, since its predecessor had complied with the statute, was the very favorable one laid down in the last quotation above.

Hence the contrasting rights of plaintiff and defendant in 1905 were these:

(a) Appellant had the first right to the amount actually diverted and beneficially used when complainant's predecessor filed in 1891 (R., p. 61). This was unquestionably but a very small amount. (W. A. Stevens, R., pp. 38, 92, 100, 234.)

(b) The Government has the next right up to 1054 cubic feet short of an actual abandonment.

(c) Appellant could have won additional water only by ten years' adverse possession, but the supply put to beneficial use in 1895 was certainly less than 80 cubic feet. The burden is on appellant to prove its right to more than 80 feet by convincing evidence and after having shown that it is wronged by the contract. The evidence here is all against appellant. The minutes of the corporation, the history of the company given by W. A. Stevens, the proof of substantial enlargement by Sharp, Bradshaw & Co. in 1903 and 1904 shows that nothing like 80 cubic feet was used in 1895.

It is readily inferable from the record that there are other rival appropriators whose rights, under the same doctrine as to compliance with the statute, would

have obtained similar priority over this appellant had the adjudication been gone forward with in 1905.

On October 21, 1905, appellant was therefore in very precarious position to obtain anything like its then user and the settlement was a very beneficial one to it. The position of the Washington Irrigation Co. on the other hand, having complied with the statute, was strong to the extent of 1054 cubic second feet, 40,000 acres having been placed under cultivation as shown by the record.

Thus appellant utterly fails to show that the settlement of 1905 was an unfortunate one for it and that the enforcement of the contract would be inequitable. On the contrary the corporation obtained far more than it could have secured by an adjudication at that time.

It may also be remarked as to present status of priorities that the United States waived its right to claim in excess of 650 feet for the Sunnyside canal, in order to bring about the adjustment of 1905, but as to any claimant not within, or as to any adverse contender successfully setting aside, such an agreement the Government would certainly have a right to assert its full claim.

*The Limitation Not Inequitable But a Generous Allowance in Fact.*

The restriction to 80 cubic feet after July 1 sought by the complaint, is as large a supply as is required by the stockholders of defendant.

The decrees of the Superior Courts hereto appended relate to irrigated lands in the same neighborhood of Kittitas county. These allowed to litigants a far less amount than claimed by appellant and less than the 80 feet of the agreement. The Manashtash decree is for one-half inch to the acre during July to September. Defendant claims 4000 inches measured from the canal under pressure five inches from the top of the orifice for an area of 7000 acres, while the decrees cited award as sufficient but *one-half inch to the acre under a less pressure*—(less pressure except in case of the Reeser creek decree).

It is admitted that a miners inch under four-inch pressure equals one-fiftieth of a second foot, eighty feet therefore would equal 4000 inches so measured or a supply for 8000 acres at the rate of one-half inch per acre. The irrigated acreage claimed, however, is but 7000 acres, leaving 500 inches or  $12\frac{1}{2}$  per cent for losses.

Mr. Anderson's attempts to show that 104 second feet must necessarily be diverted from the river (R., p. 116) to supply 90.4 second feet to the land. (R., p. 111.) The net seepage loss as he contends, is 13.6 cubic feet, or 13.1 per cent. The loss would be greater apparently but that the canal has very large accessions from irrigated lands above. (R., p. 122.)

Then if 13.1% is lost, and 80 feet allows but  $12\frac{1}{2}\%$  for loss in order to deliver one-half inch per acre under four-inch pressure to the land after July 1, a very slight improvement in the canal, at points where Anderson

proved extreme losses, is all that would be necessary to provide ample water. It certainly cannot be deemed unconscionable that the appellant in order to obtain so satisfactory a settlement should in 1905 set itself a limit such as would require a little more skill in the carriage of water through its canal.

In fact so slight an improvement in facilities could doubtless be forced on defendant by the courts if no contract had been made even at the suit of later appropriators.

Mr. Justice King in the leading Oregon case of *Hough vs. Porter*, 98 Pac., p. 1102, 1103, says:

"In this arid country such manner of use must necessarily be adopted as will insure the greatest duty possible for the quantity available. The wasteful methods so common with early settlers can, under the light most favorable to their system of use, be deemed only a privilege permitted because it could be exercised without substantial injury to any one; and no right to such methods of use was acquired thereby."

Mr. Justice Morrow in the case of *Anderson vs. Bassman*, 140 Fed. 10-26 (C. C. A.), approves the following:

"The time is near at hand when greater attention must be given to these matters (care in the use of water), and greater care and caution be exercised, to prevent parties from loss and damage which are or may be occasioned to other parties having equal rights to the waters of the river. An excessive diversion of water for any purpose cannot be regarded as a diversion to a beneficial use. Water in this state is too scarce, needful, and precious for irrigation and other purposes to admit of waste.'"



Where the soil is porous the appropriator must improve the canal when water becomes scarce. *Shotwell vs. Dodge*, 8 Wash. 341; 36 Pac. 254.

A supply of say an inch to the acre under four-inch pressure or 1/50 of a second foot during April to June and prior to the period as to which the United States seeks relief, would amount to approximately 3.6 acre feet. "One second foot of water flowing continually for 24 hours will amount to 86,400 cubic feet, or nearly two-acre feet." *Kinney on Irrigation*, 2nd Ed., p. 1582. Half that supply during July to September inclusive would amount to 1.8 acre feet more.

Surely five and four-tenths feet deep of water over the land is ample to all necessities. It is more than can lawfully be appropriated in several states.

Nebraska and New Mexico allow but one cubic foot *as a maximum appropriation* for each 70 acres (Neb. L. 1911, p. 505; N. Mex. Act of March 19, 1907, Sec. 43).

Nevada allows at the most but 3 acre feet where the season is not over six months. (Nev. Act. of Feb. 26, 1907, Sec. 5.)

The North Dakota limit is one cubic foot to 80 acres. (N. Dak. Act. of Mar. 1, 1905, Sec. 49.)

In the case of *Anderson vs. Bassman*, *supra*, the court *takes judicial notice* that a less amount than defendant herein claims was excessive:

"It needs no argument to show that this claim is excessive (i. e. 1.14 inches to the acre under 4 inch pressure), exclusive of other sources." 140 Fed. 29.

*The burden is on defendant to prove that a larger supply than the contract amount is necessary if it would show the enforcement of the contract to be unconscionable. The only evidence in the record on this supremely important subject is the following:*

"I will ask you this question: From your knowledge and long acquaintance there on the West Side and knowledge of the conditions is the amount of 4,000 inches, according to the measure of inches which you use, a needed amount when measured out through the measuring box taken out of the canal a necessary amount for the proper irrigation of this land lying under the canal?

I doubt very much if it is sufficient amount to irrigate all of the lands *when put under cultivation.*" (R., p. 97 and 98.)

In so far as defendant urges its necessities for more water it is for the purpose of rounding out the farms under the canal and putting in the remaining untilled lands. The company apparently sets up the right at this late date, and in violation of the agreement to increase its area and utilize the last issue of stock which the record shows has a value of \$30 a share. (R., p. 164.)

## THE BALANCE OF THE EQUITIES STRONGLY FAVOR COMPLAINANT.

When dissatisfaction with the settlement arose the question was raised as to the course to pursue. Should they, before the United States had started upon its enterprise, seek a cancellation or reformation of the instrument? They naturally feared the outcry from the

people of the valley against litigation, the precipitation of the matter into the courts, possibly repudiation by others, and the reconsideration or delay of government work which would have followed unless the Secretary of the Interior reversed his policy outlined to Representative Jones.

Such a step they were evidently not willing to take. They wished to secure the advantages of the Federal project and to await a date for repudiation of their contract when the United States could not withdraw or withhold action pending decision of the defendant's suit.

An informal conversation was had by Mitchell Stevens, one of the stockholders, with Mr. Noble, who had left the employ of the United States many months previously and was then employed by the county, and advising Mr. Stevens about other business (R., p. 191). Mr. Stevens then stated that the company would not abide by the agreement. The disavowal was never communicated to any agent of the United States and if Mr. Noble had still been in employ of the Government the conversation had was unofficial so far as the company was concerned and Noble would not have been justified in assuming that Stevens spoke for the company upon so important a matter.

Nothing further was done until 1909 (R., p. 151), when the stockholders authorized suit to set aside the agreement, having now as appears in the resolution enlarged the canal to a capacity of 5000 inches. (R., p. 150.) But again for reasons which do not appear

no suit was instituted and plaintiff was permitted to go on expending its money without notice of disaffirmance. And now the United States has expended \$8,000,000 upon the project, not a dollar of which would have been expended without the settlement of the water rights, while defendant's stockholders sat quietly by determining to repudiate their agreement at an opportune time.

*The Agreement Is a Necessary Part of an Intricate Adjustment. It Cannot Be Destroyed Without Widespread Effects.*

The position of appellant appears to be that while the settlement with all other water users made at the same time and under the same circumstances should be enforced, this particular contract should be so construed as to nullify it!

It must be recalled that the aggregate claims of all the users was required to be reduced, and was reduced after great effort (Splawn, R., p. 82) to the amount to be found in the river in normal seasons during the low water period. The requirements of the situation were presented to users in the following terms:

“\* \* \* in order for the government to come in this valley and undertake a project it was necessary that the water rights all be confined to a quantity that would not exceed the flow of the stream, and that if they signed for more than was actually diverted by them that somebody else would have to sign for less, and that it was up to them, the people as a whole and the committees, to determine what each could or would sign for.” (R., p. 187.)



But the figures inserted in the contracts were left to the signers and to the committee and not to the agents of the United States. (R., p. 187.) The water was therefore apportioned among the claimants and the proposition as submitted to the Secretary of the Interior showed that the claims had been reduced to come within the limits of the actual supply.

This being the case, it is pertinent to inquire if the agreement is to be set aside from what source will the defendant be supplied to furnish the addition to the limitation figure.

From which of the other claimants will defendant obtain this additional flow? Or will all of the 50 canals and ditches be called upon to contribute?

This is manifestly a test case for if one of the corporations executing limiting agreements is able to avoid the consequences upon the doctrines asserted by appellant, the decision would doubtless become a precedent for similar action by others and the entire extra-judicial settlement be vitiated.

If appellant prevails in this suit, all water rights from the Yakima river must be adjudicated in Court, for the plaintiff as appropriator for its Sunnyside and Indian Reservation projects cannot permit itself to be deprived of its just rights.

The necessity that these limiting agreements be kept in good faith is as important to the present and future successful operation of the Government Reclamation Project at Yakima as their execution was necessary to procure the inception of the work, and we respectfully

submit that no sufficient showing has been made for modifying their terms or construing them out of existence.

FRANCIS A. GARRECHT,

United States Attorney,

Spokane, Washington,

E. W. BURR,

Special Assistant to U. S. Attorney,

*Attorneys for Appellee.*

## APPENDIX.

EXCERPTS FROM DECREES AND FINDINGS RENDERED IN  
CERTAIN CASES.

IN SUPERIOR COURT OF KITTITAS COUNTY,  
STATE OF WASHINGTON.

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Christopher Gray and S. R. Geddis,	}	Nos. 99 & 100 Journal 3, p. 123 DECREE
<i>Plaintiffs,</i>		
vs.		
Ole Johnson, <i>et al.,</i>		
<i>Defendants.</i>		

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## I.

That by an inch of water wherever mentioned in this decree, is meant the amount of water which constantly flows through an opening one inch square through a plank one inch thick in the side of a box in which still water is maintained at a constant depth of *four inches above* the top of the opening.

## II.

That wherever any number of inches of water is herein awarded to any person, said number of inches are awarded to such person during the months of *April, May and June perpetually*, and *half that number of inches during the remainder of the year* is awarded to such person.

WM. H. UPTON,  
Judge.

Dated April 15, 1891.

Entered May 15, 1891.

Manashtash Creek.

Gray & Geddis,

vs.

Johnson, *et al.*,

}

FINDINGS OF FACT.

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9.

That among the earlier settlers upon said lands, it was the custom to irrigate their lands by flooding them, using perhaps ten times the amount of water required under the methods now in use.

10.

That under the system of irrigation now in vogue, among all the parties to this action, *one (1) inch of water per acre*, in the months of *April, May and June*, and *one-half an inch of water per acre during the remainder of the year*, is necessary and sufficient to irri-



gate all the lands mentioned in the pleadings herein, except a few small parcels which are hereinafter specified.

Manashtash Creek.

James Ferguson, *et al.*,

vs.

The United States National Bank  
of Portland, Oregon, *et al.*,  
No. 2607

} Entered Journal 12,

p. 397

} FINDINGS &  
CONCLUSIONS.

II.

That by the term "inch of water under a four-inch pressure", is meant all the water that will flow through an orifice one inch square in a box maintained at a level into which a sufficient amount of water is let to keep the surface thereof four inches above the center of such orifice, the bottom of such orifice being two inches above the bottom of such box.

VI.

That *one inch* of water measured as aforesaid flowing continuously during the spring months is necessary for the proper irrigation of an acre of the said lands, and *one-half inch* for each acre measured as aforesaid from and after *the first day of July of each year*.

THOS. H. BRENTS,

*Judge.*

Dated May 6, 1901.

Nanum Creek.

Mary A. Clerf,	}	No. 3535
vs.		Entered Journal 18, p. 210
Robert I. Scammon, <i>et al.</i> ,		FINDINGS & CONCLUSIONS.

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## IV.

That all the lands contiguous and adjacent to said Caribou Creek are naturally dry and arid and will not produce agricultural crops without artificial irrigation. That by economical distribution and use of the waters of said Creek, said lands can be made to produce profitable agricultural crops by the application of *one-half of one inch of water per acre*, and the allowances and amounts hereinafter awarded to the several parties hereto are based upon such an amount per acre. That, following the custom obtaining in that locality, the amounts herein allowed shall be measured by the inch, according to the custom of miners, under a *four-inch pressure*.

## DECREE.

## 1.

That by the terms "inch of water", "an inch of water under a four-inch pressure", or "an inch of water under a four-inch pressure, measured according to the custom of miners", is and shall be meant an amount of water which shall continuously and constantly flow through an orifice one inch square in a box, maintained

at a level, into which a sufficient quantity of water is let to keep the surface thereof four inches above the center of such orifice, the bottom of such orifice being two inches above the bottom of such box.

RALPH KAUFFMAN,

*Judge.*

Dated April 25, 1911.

Caribou Creek.

P. H. Schnebly, *et al.*,

vs.

Harvey Huss, *et al.*

No. 4762.

Entered Journal 21, p. 7

FINDINGS &  
CONCLUSIONS.

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4.

That the parties hereto through their respective attorneys have *stipulated* and agreed in open court that one-half inch of water, miner's measure under a *four-inch pressure*, being one one-hundredths of a cubic foot per second of time, shall be the amount to be allotted for the irrigation of each acre of land for which water is claimed in this action.

## DECREE.

## 1.

That wherever in this decree the term "an inch of water" is used it shall be deemed to be the equivalent of one-fiftith of a cubic foot of water per second of time.

RALPH KAUFFMAN,  
*Judge.*

Dated Feby. 1st, 1915.

Coleman Creek.

Bernard Hansen,	}	No. 3451
vs.		
David McIntire, <i>et al.</i>		Entered Journal 15, p. 112

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## 4.

That almost all of the lands belonging to the parties in this case are naturally dry and arid and will not produce agricultural crops without irrigation, and that such irrigation is necessary for said lands during the spring, summer and autumn months.

## 5.

That one-half of an inch to the acre is sufficient water for the irrigation of the lands of the parties here-



to; that by one-inch of water mentioned in these findings and in the conclusions of law and decree, is meant an inch of water measured under six-inch pressure according to the custom of miners.

N. B. RIGG,  
*Judge.*

Dated May 18, 1906.

Reeser Creek.



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IN THE  
**UNITED STATES CIRCUIT  
COURT OF APPEALS** 3  
FOR THE  
**NINTH CIRCUIT**

---

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA,

*Appellee.*

No. 2866.

---

**BRIEF OF APPELLANT**

---

UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT, FOR THE EASTERN  
DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION.

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H. J. SNIVELY,

*Attorney for Appellant, North Yakima, Wash-  
ington.*

**Filed**

JUN 9 - 1917

F. D. Monckton,  
Clerk.





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**UNITED STATES CIRCUIT  
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STATEMENT OF THE CASE.

The Yakima River is a considerable stream, which has its source in the heart of the Cascade mountains, and flows into the Columbia River. It is about 130 miles in length. It flows through several of the principal valleys of Central Washington;

one of the most fertile of these valleys is that known as the Kittitas Valley.

This valley is naturally arid sage brush land. The valley is divided into two parts; the West Kittitas Valley and the East Kittitas Valley, the West Kittitas Valley being on the west side of the river and the East Kittitas Valley on the east side. The land in the West Kittitas Valley is the most fertile of the two, and there is no more fertile land, with the proper amount of water, in the world.

Even before this region was penetrated by the Northern Pacific Railway, this valley had attracted many settlers, and the year of 1889 found all of its land in the hands of individual owners. The water in the Yakima River, fed as it is from the snows of the mountains, is of great volume, and as it comes from the melting of the snows, the river is particularly full during the months of May, June and July.

In the year 1889 but little of the water had been used for irrigation. The struggling settlers, prior to that time, had not been financially able to take water in any great quantities from this river, but had contented themselves with using water from the creeks flowing through the valleys into the river; but as the Northern Pacific Railway brought a market, so did it bring increased financial ability and assistance, and in this year of 1889 the settlers of the West Kittitas Valley joined hands and began the irrigation and development of their lands in a much more pretentious way than theretofore.

They discovered that seven thousand acres of most excellent land could be irrigated by a canal taken from the Yakima River. They put their means together and began the construction of the canal known as the West Side Irrigating Canal, which canal is now vested in the West Side Irrigating Company. It was begun as a community canal and has always been operated and maintained as such. It was planned and built from the start to irrigate this seven thousand acres of land owned by its builders. Each man that helped to build it contributed his mite to get water to irrigate land which he actually owned.

The flumes constructed in 1889 to 1891, when the canal was finally completed, were of the identical dimensions of the present canal, and long prior to the year of 1905 this seven thousand acres of land watered by this canal had been placed in cultivation and the water had been applied to a beneficial use to the full amount of the carrying capacity of the canal.

On June 17, 1902, Congress passed an act known as the Reclamation Act, and the bureau having in charge the execution of this act cast about over the country for projects that would afford an opportunity for the development contemplated by the act. It is not to be wondered at by those acquainted with the Yakima Valley that the governmental eye rested wistfully upon that favored land. After several years' investigation the Government, in 1905, dis-

covered three facts respecting the Yakima Valley, and the Yakima River.

First, that there was remaining a large amount of land in the Yakima Valley susceptible of being reclaimed by water.

Second, that all of the waters naturally flowing in the Yakima River had been fully appropriated, and were already being beneficially used on the lands of the valley.

Third, that at the head water of the Yakima River and its tributaries, were many lakes and reservoir sites where water could be cheaply stored to irrigate all of the lands not reclaimed by the natural flow of the river, that such water could by any possibility be made to cover.

This condition seemed to appeal to this governmental Reclamation agency. It was easily within the ability of private investors to take the water from the river to irrigate lands along its banks, but it was not within the financial power of private persons or corporations to undertake the gigantic task of storing these waters. The Government saw the opportunity and realized that this was really an undertaking that must have been in the Congressional mind when the Reclamation Act was passed.

Here were fertile lands in the valley, awaiting the magic of water to astonish the world with their fertility; here were reservoirs already made that needed by to be dammed and drained to furnish



the supply of water, and back of these waters were the eternal snows and glaciers of the Cascades to more than keep them filled.

In and prior to this year of 1905 there had been legislation in the state of Washington, and Supreme Court decisions determining that rights could be obtained in streams for the purposes of using the water for irrigation. These rights could be obtained in two ways: First, by actually diverting water and putting it to a beneficial use. Second, by filing certain Notice of Appropriation of a certain amount of water, with the county auditor in any county in which a stream was situated, in which appropriation was claimed.

When the Reclamation Service, in 1905, began seriously to consider entering the irrigation field in the valleys, it found that the paper appropriations of the water in the Yakima River and its tributaries, added to the actual appropriations, many times exceeded the natural flow of the stream. It also discovered that while much of the water covered by these paper appropriations was not used, yet all of the available natural flow of the Yakima River actually was put to a beneficial use in irrigating land.

The Reclamation Service found it attractive to come into the field under these conditions; that is to say, it found it attractive to come into the valley to irrigate and develop these lands then unirrigated by depending solely upon stored water to irrigate

them. And the Government did so enter the field of irrigation in the Yakima Valley.

It was necessary, however, for the Government in order to irrigate these lands through storage, to use the Yakima River to carry the water to the intake of its distributing canals. In order that it could protect itself from having the stored water that it put in the river taken out for purposes other than that which the Reclamation Service intended, it was necessary to settle and determine the amount of water of the said River already appropriated, and to obtain releases from the paper appropriations. Therefore, the Reclamation Service sent its agents throughout the Yakima Valley to confer with claimants to the water of the Yakima River and obtain a statement as to the amount of water claimed by each user or appropriator.

Thus it was that in the spring of 1905 one T. A. Noble, district engineer of the Reclamation Service, visited the Kittitas Valley for the purpose of conferring with the water users in that valley in reference to their claims to the natural flow of the water of the Yakima. As he tells us in his testimony (R. pp. 187 and 188) he asked for a public meeting through the Commercial club of the water users of the whole Valley, and he told them that before the Government would undertake a project in the Valley that it was necessary that the water rights in the natural flow of the stream should be confined to a quantity that would not exceed the flow of the stream.

In conformity with the request of the Government the various corporations and persons taking water from the River did, during the year 1905, make statements in writing as requested, the Appellant among others. The one made by the Appellant is in words and figures as follows:

“The West Side Irrigating Company, to PUBLIC  
Between the Appropriator Taking Water from  
the Yakima River and Its Tributaries.

WHEREAS, The Reclamation Service of the United States has been requested to investigate the water resources of the Yakima Water Shed with a view to the further development and increase of irrigation therein, under the provisions of the Act of Congress approved June 17, 1902 (32 Stat. 388), known as the Reclamation Act, and whereas the officers of the Reclamation Service in preliminary investigation have found that in *all the low water flow of the Yakima River and its tributaries has been appropriated* and is now being diverted by the various canals within said watershed and that in order to irrigate additional lands within said watershed it will be necessary to store the surplus waters of the flood season, and whereas, no irrigation project to be undertaken by the United States within the said watershed can be recommended as feasible unless the quantity of water to which each present user from the Yakima River and its tributaries is entitled be first definitely ascertained and agreed to, and, whereas, the undersigned claim certain quan-

tities of water from the Yakima River and its tributaries and are willing to limit their claim to the said waters to the quantities of water designated in the following schedule:

### SCHEDULE.

Cubic Feet per Second.		
April to August Inclusive.	September.	October.
80	80	34

Now, therefore, in order to avoid litigation, to encourage the storage of water in the Yakima watershed and to secure the indirect benefit derived from further irrigation through Federal enterprise, each subscriber to this agreement or to a copy thereof, differing only as to the quantities of water specified, agreed to limit and does *limit its respective rights of appropriation* from said Yakima River and its tributaries to the above specified amounts, provided, that it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise, in order to secure the benefits above referred to and shall not bind any party hereto in any event, unless the determination to construct storage and irrigation works by the United States under the Reclamation Act shall be announced by the Secretary of the Interior within two years from the date upon which he is furnished with properly authenticated copies of the agree-



ments of this form duly executed by or on behalf of such proportion of the claimants of the waters of the Yakima River and its tributaries as shall be satisfactory to the Secretary of the Interior. In witness whereof, the undersigned has caused these presents to be executed in its corporate name, by its president, and attested by its secretary, and its corporate seal to be affixed, by authority of its board of directors, heretofore duly made and entered this 21st day of October, 1905.

THE WEST SIDE IRRIGATION COMPANY,  
By MITCHELL STEVENS,  
Vice President."

On the 21st day of October, 1905, when this statement was signed by Mitchell Stevens, Vice President of the said company, the West Side Irrigating Canal had been furnishing water to irrigate the lands of the men who had constructed it from as far back as the year of 1889, continuously. It was built, as heretofore has been stated, to irrigate seven thousand acres of land, being the land susceptible of irrigation, owned by the men who had constructed it, and all of this amount of land had been in cultivation—not every year, however, because at times when the prices of crops were low, the land was not farmed to its full extent, and sometimes for one reason, sometimes for another, a farm or so was not farmed during a particular year. But the canal had reclaimed seven thousand acres of first class land.

The flow in the canal never had been measured at its intake, when the said statement was signed by Mr. Stevens. There had always been plenty of water in the river and the rights of the appellant had never been questioned. The canal ran along the bank of the river in the gravel for a number of miles before it began to reach irrigable land, and a large part of the water ran directly back into the river through this gravel.

The water was measured to persons entitled to water from the canal through a home made device adopted by these farmers without any knowledge of engineering or without the assistance of any engineer, and the water of each shareholder in the canal was measured to him through this device. These farmers had never heard of the cubic foot of water and they had adopted the idea of measuring water by inches without any definite idea even of the pressure.

Under the system of measurement by which the appellant was apportioning the water of its canal on the 21st day of October, 1905, it was furnishing four thousand of such inches to its water users, and it took four thousand of such inches measured at the intake of the lateral ditches of its various water users, to irrigate their seven thousand acres of land.

Mr. E. I. Anderson, a very competent irrigation engineer, who testifies in this case, has concisely given to us a description of the method of measurement in the following language:

“The West Side Irrigation Company’s module for the (56) measurement of water consisted of a box, entering one side of which an orifice has been cut, the width or depth of that orifice being about four inches; the bottom of the orifice being about three inches above the bottom of the box and the top of the orifice being five inches below the top of the box, making the total depth of the box twelve inches. In the operation of those for the distribution of water, they divert the water from the canal into what they term the draw-box, which is essentially a rectangular box, that is, in cross-section it is rectangular and extends in length sufficient to extend through the bank of the ditch, having a head in the main canal, and the amount of water that goes into the draw-box is regulated by just a sliding gate which works upwards. The function of that draw-box is simply to measure the amount of water to this measuring-box I have heretofore described, and in the operation of this canal they admit an amount of water into this measuring-box until the water comes to the top of the box. The dimensions of the box vary according to the amount of the water that they have to discharge, those discharging a larger quantity being larger in size, cross-section, than those having a small quantity, the idea being to maintain the water at the top of this measuring-box in as quiet a condition as possible.” (R. pages 9 and 10.)

When asked to reduce four thousand inches measured according to this module to second feet Mr. Anderson answered that the four thousand

inches measured under these farmers' way of measuring, converted into second feet, would equal 90 4-10 second feet (R. P. 111.) Thus, on the 21st day of October, 1905, the users of water from the West Side Irrigating Canal were in the aggregate receiving 90 4-10 second feet of water at the intakes of their various laterals.

Throughout the Pacific Coast, prior to the advent of the Reclamation Service, when we spoke of the measurement of water, we talked of it in inches; or rather, miners' inches, and it would be miners' inches under a six inch pressure or under a four inch pressure generally, and engineers have come approximately to an estimate of an equivalent of miners' inches to cubic feet; thus, approximately, a cubic foot is said to equal fifty inches of water under a four-inch pressure.

Now when these farmers and Mr. Noble had their conference Mr. Noble talked in cubic feet per second of time, while the farmers talked in inches, and during the conference, according to Mr. Noble, whose testimony is to be found in the record, the farmers representing the West Side Irrigating Company told him that they needed four thousand inches of water to irrigate their lands. They naturally meant the only inch that they understood, which was the inch provided for the distribution of the water in their canals, hereinbefore described by Mr. Anderson.

No description was given to Mr. Noble, or so far



as the record appears, to any other officer of the Reclamation Service, of the character of the inch which the farmers referred to, and the officers of the Reclamation Service jumped at the conclusion that it was the usual inch known to engineers as a miners' inch, under four inches pressure, measured from the center of the orifice. Such an inch as this would make fifty of such inches equal a cubic foot, or the four thousand inches equal eighty cubic feet; but as has been stated before, the inch as used by the appellant was a different inch from this inch obtained by pressure of four inches, from the center of the orifice, and hence the farmers were mistaken in taking the word of the engineer of the Reclamation Service that these four thousand inches measured out to them by the peculiar measurement of the appellant equalled eighty cubic feet, and the officer of the Reclamation Service was mistaken in assuming, without examining into the matter, that the measurement of appellant was the usual measurement under four inches pressure, from the center of the orifice.

When this statement was therefore signed by Mitchell Stevens, as Vice President of the Appellant, he supposed, and had reason to suppose, that the eighty cubic feet was equal to four thousand inches according to the peculiar measurement of appellant, and he assumed, as he had a right to assume, nothing having been said to the contrary, that the appellant was to measure this water as it always had been measured at the intake of the water users'

laterals. The evident mistake was, First, that the actual inch measured by the appellant's module was not a measurement under four inches pressure from the center of the orifice, and that instead of running eighty cubic feet per second of time, four thousand of such inches as appellant measured out to its users of water, was ninety and four-tenths cubic feet. Second, there was a misunderstanding as to where the water was to be measured. The appellant never had measured any water at its intake, but always had measured it out to its users at the intake of their laterals, and the agents of the United States knew this, as they had agents on all of these canals prior to the making of this agreement. The appellant corporation went right on after this statement was signed by Mr. Stevens, using the water it had always used, until it was enjoined from so doing in this proceeding.

The evidence shows that the users of water from this canal need this four thousand inches measured to them at their intakes, or ninety and four-tenths second feet. The canal before it reaches the distributing laterals loses by seepage, through the gravelly banks of the canal, as it is constructed by the river, about fourteen second feet. Thus, in order to give the users of water from appellant's canal the water needed by them, and the water which they had always been using, there would have to be 104 4-10 second feet taken in the canal at its intake; whereas, the decree of the court allows only eighty second feet at the intake, and taking from the 80 second feet the

seepage of 14 second feet that runs back into the river, and which the Reclamation Service gets the benefit of, only leaves 66 second feet to distribute among the users of water in this canal, which is entirely insufficient for the needs of the seven thousand acres dependent upon this canal for irrigation.

The lower court decreed that the water should be measured practically at the intake of the appellant's canal, and that it is only allowed 80 cubic feet per second at this point, from and after July 1st, to September 30th; whereas, appellant contends that if this statement has any effect upon its right to take water from the river that it should not in equity and good conscience, be prevented under it from taking less than 104 4-10 second feet from the river if measured at the Gordon flume and that any other construction would do violence to the rights of these appellants and their intentions in making this statement, for the convenience of the government.

No questions relating to the introduction of evidence are raised, and the questions to be considered by the court are whether or not the complaint states a cause of action; whether the court has jurisdiction, and, in view of all of the facts, if a cause of action is stated, and that the court has jurisdiction, whether or not the alleged contract was enforceable on account of mistake of the parties, and if enforceable what the proper construction thereof is. These matters will be more particularly set forth in the discussion of the specifications of error in the argument.



## ASSIGNMENT OF ERRORS ON APPEAL.

Now, on the 17th day of August, 1916, came The West Side Irrigating Company, a corporation, by its solicitor, H. J. Snively, and says that the decree rendered and entered in said cause is erroneous and against the just rights of said The West Side Irrigation Company for the following reasons:

First. Because the Amended Complaint upon which suit decree was rendered does not state or set forth any facts or equities entitling the complainant to any equitable relief.

Second. Because the complainant is not authorized by any act of Congress or any other lawful authority to maintain this suit or any suit of this character.

Third. Because the United States is not vested by law with any authority, nor is the Secretary of the Interior, nor the Attorney General of the United States, to maintain a suit of this character, the United States not being a party in interest and the benefits of said suit accruing entirely to private interests.

Fourth. That said suit was brought without any legally lawful authority and it was erroneous to enter any decree therein for that reason.

Fifth. That the record shows that the court was without jurisdiction of any kind or character to try, hear or determine this controversy, or enter any



decree therein, other than a decree of dismissal for the reason that no property or other right of the United States of America was involved in this suit and Said United States of America is not vested with any authority, power or right to engage in litigation of this nature.

Sixth. Because the evidence showed that the officers of The West Side Irrigating Company had no authority to enter into the alleged agreement dated the 21st day of October, 1905, upon which the decree of the court in this case is founded.

Seventh. Because the evidence showed that the said alleged agreement upon which the decree in this cause is founded purporting to be entered into on the 21st day of October, 1905, was made without any authority upon the part of the said corporation and was without the powers of said corporation. The Articles of Incorporation of said corporation only authorized the said corporation to carry and distribute water and to in no manner sell or dispose of water, or own water. Said alleged agreement was therefore null and void.

Eighth. Because the evidence showed that said alleged agreement was not an agreement, had no mutuality, was without any consideration, and was unenforceable.

Ninth. Because the evidence showed that said alleged agreement was indefinite and uncertain and founded upon a mistake in this, to wit: The officers of The West Side Irrigating Company who executed

the said alleged agreement believed that eighty (80) cubic feet of water per second of time was equivalent to four thousand (4,000) inches of water under the measurement in use by them; the evidence showed that they measured their water in a certain way by inches under pressure and they were informed by the engineers of the complainant, who had technical knowledge upon the subject, that eighty (80) cubic feet of water per second of time was equivalent to four thousand (4,000) inches of water according to the measurement of the said corporation in use at that time, and having no technical knowledge upon the subject, they accepted this statement of complainant's engineers, and instead of putting into said alleged agreement four thousand (4,000) inches of water under pressure, as used by said irrigating company at that time, eighty (80) cubic feet per second of time was inserted; the evidence showed that the said officers intended to reserve all of the water which had been provided for the use of the lands under said irrigating company's canal, which they knew to be four thousand (4,000) inches, as measured by the said company, under pressure; and the said officers only executed said alleged agreement upon the supposition and belief that said eighty (80) cubic feet per second of time was equivalent to said four thousand (4,000) inches as measured by said company at that time under pressure, whereas, in truth and in fact, it is shown from the evidence that eighty (80) second feet is not the equivalent of four thousand (4,000) inches as

measured by said company, but that ninety and four-tenths (90.4) cubic feet per second of time is the equivalent thereof.

Tenth. Because the evidence showed that the intention of the officers of the irrigating company was to release only that portion of the waters of the said river not required to irrigate the lands of the stockholders of said company, but that it was the intention of the said officers to reserve all of the water required to for the full and complete irrigation of the lands of the stockholders of the said company. It is shown from the evidence and admitted facts in the case, that under the decree of the Court as rendered and entered in this cause that the said eighty (80) second feet of water is insufficient to fully irrigate the lands of the stockholders of the said company or to furnish the amount of water to which the said stockholders are entitled in virtue of their several appropriations and rights. That it was manifestly not the intention of the said officers and certainly not within their power or authority to release to the United States for the irrigation of other lands in which their stockholders are not interested, water required for the irrigation of said stockholders' lands.

Eleventh. That said alleged agreement does not provide a place for the measuring of said water, and the evidence showed that the said defendant corporation had no measuring apparatus at the place that it took water from the Yakima River, but that



it measured the water through boxes placed in the service laterals along the ditch; those service laterals measured water by inches under pressure. That the evidence showed that it was never contemplated by any of the parties to said alleged agreement that the water taken from the river by said irrigating corporation should be measured at the intake; that the evidence showed that the defendant corporation's canal for a long distance runs along the banks of the Yakima River through gravel, and that a large portion of said water runs back into the river before it reaches any of the distributing laterals. That when a full head of water is running in said canal, at least twenty (20) cubic feet per second of time of the said water runs back into the Yakima River, and never enters the distributing ditches of the defendant corporation; that thus, instead of getting even eighty (80) cubic feet of water per second of time, the defendant corporation actually gets only sixty (60) cubic feet or less, of water per second of time.

Twelfth. Because in view of the uncertainty of said alleged agreement as to the place of measurement and the evident intention of the parties as shown by the evidence and the mistake made in transposing the four thousand (4,000) inches as measured by said corporation into eighty (80) second feet, even if said agreement otherwise would be regarded as valid by the Court, the equities of the case as shown by the evidence and record does not authorize or uphold any other decree than a decree



providing for the actual distribution from the Yakima River of water sufficient for the irrigation of the lands of the said stockholders of said corporation; that no other decree would be just and that such a decree alone would carry out the intention of all parties; that is to say, the decree, in the event of said alleged agreement being held valid otherwise should provide that there should be measured out to said corporation sufficient water to irrigate the lands of the stockholders thereof, to wit, about seven thousand (7000) acres of land, in the manner and quantity in which they had been using such water, and in which they contemplated using it and that over and above this any right to water out of the Yakima River is waived by said agreement. That it is an injustice to the stockholders of said corporation to be arbitrarily cut down in the use of water below their requirements.

Thirteenth. Because the evidence failed to show that the United States performed the conditions of said agreement.

Fourteenth. Because the evidence failed to show that the complainant had any right or claim against The West Side Irrigating Company.

Fifteenth. Because the evidence showed and the court found, that the defendant corporation is only interested in the agency and that the real parties in interest in the water carried by said corporation are the owners of the land. That the use of said waters is appurtenant to said land. That the said corpora-

tion had no right to release any interest in said land; that said land is generally owned by husband and wife under the laws of the State of Washington; that the laws of the State of Washington covering the rights of husband and wife are known as community property laws, and section 5918 of Remington and Ballinger's Annotated Codes and Statutes of Washington is as follows:

“The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife; Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon, as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon. (Cd. '81, 2410; 1 H. C. 1400.)”

and under said provision any conveyance of property not made by a wife and husband jointly is void according to the decisions of the Supreme Court of the State of Washington. That if said agreement is given effect, as it is by the decree complained of, the effect will be to transfer the interests of the

wives of the owners of said community property in real estate in contravention to the above Statute.

Sixteenth. Because the evidence showed that the act of the Trustees and officers of the defendant corporation in signing the said alleged agreement was repudiated on the second day of January, 1906, and that at that time the United States Reclamation Service had not expended any money in virtue of said alleged agreement, or performed any of its conditions. That under the evidence the said alleged agreement was not even *prima facie* valid, but was invalid; that the Court erred in holding that notice of its repudiation had to be given to the reclamation service. Said officers were agents only of the corporation and the *Court erred in holding that the United States was entitled to treat said officers to act and bind the stockholders.*

Seventeenth. Because the evidence showed that the alleged agreement, if properly construed by the learned District Judge, is inconstruable and should not be enforced in a court of equity.

Eighteenth. Because it is shown by the evidence that complainant is not entitled to any relief whatever in a court of equity.

Nineteenth. Because the evidence fails to show that the United States is injured or that any interest represented by it is injured by the defendant corporation under the quantity of water claimed by it from the Yakima River, or that the United States can put said water to a beneficial use.

Twentieth. Because the evidence showed that the complainant is in a court of equity, praying specific performance of an alleged agreement without showing any consideration therefor.

Twenty-first. Because the evidence failed to show that Mitchell Stevens, Vice President of The West Side Irrigating Company, had power to bind said company or that his act was in any manner authorized by said company.

Twenty-second. Because said alleged agreement was not executed under the seal of said company by any authorized officer of said company, or by the authority of the stockholders thereof.

Twenty-third. Because the Court erred in holding that eighty (80) cubic feet per second is conceded to be the equivalent of four thousand (4000) inches as measured by the defendant corporation.

Twenty-fourth. Because the *Court erred in finding from the evidence that the object in purpose of the Government was to ascertain and fix the quantity of water diverted from the river and not the quantity actually used for irrigation.* All of the evidence taken together, in view of the surrounding conditions of the parties will show that in making this alleged agreement certainly the defendant corporation had in mind the quantity of water actually used for the purpose of irrigation and not the quantity diverted from the river.

WHEREFORE, The West Side Irrigating Company prays that said decree be reversed and that



said court may be directed to enter a decree dismissing the Bill of Complaint or to modify the same to the end that the stockholders of said Irrigating Company shall be awarded the amount of water which they require for the full irrigation of all their lands under the canal of the said irrigating company.

## ARGUMENT.

### 1.

The first assignment of error raises the question as to whether or not the complaint sets forth a cause of action for equitable relief. It is well established by the following authorities that when the United States asserts a pecuniary demand against a citizen or seeks to protect its proprietary interests, its rights are measured by the same rules as those of a private litigant. *United States vs. Midway Northern Oil Co.*, 232 Fed. 619; *Sweet vs. United States*, 228 Fed. 421; *Chase vs. United States*, 222 Fed. 593.

The same principle applies therefore, to this action as if it were between individuals.

It has been well established by the courts in decisions too numerous to mention, that equity will not enforce remedies to protect speculative rights; and that illustration of the application of this principle is to be found in the case of *Coulee Livestock Co. vs. Pluvius Development Co.*, 75 Wash. 109. The court in that case announces the following rule:

“Equity will not enjoin the diversion of waters required for irrigation where the plaintiff sustains only nominal damages; and where the result is problematical, and it is impossible to ascertain with any degree of certainty the effect of the contemplated diversion, and neither party will lose any rights, the action may be held in abeyance until such time as the damages, if any, can be ascertained by dependable facts.”

The complaint in the case at bar shows facts from which it might be inferred that some time in the future, if Congress is willing, that the water of the Yakima will all be utilized by the Reclamation Service, together with the water capable of being impounded. The complaint does not show that the United States, or any one in privity with it has been deprived of the use of water, and it does not show that present injury has been caused to it or anyone in privity with it. It comes squarely within the rule laid down in the above entitled case, and measured by this rule it is found wanting. Not a single fact is alleged from which present injury can be even remotely inferred.

“The mere assertion that the apprehended acts will inflict irreparable injury is not enough.

Facts must be alleged, from which the court can reasonably infer that such would be the result.

*Cruickshank vs. Bidwell*, 176 U. S. 377.”

## 2.

The second, third, fourth and fifth assignments,

in one way or another raise the same question of law, and will be argued together.

The Reclamation Act itself confers special authority upon the Secretary of the Interior to institute suits for the purposes of said act. The whole subject is covered by Section 7 of said act, which is as follows:

“Sec. 7. (Condemnation for rights, etc.) that where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.”

This is exclusive of any other authority in the premises, under the well-known principle of construction that when authority is expressly given it excludes power by implication. It is hard to conceive that Congress intended to give the Secretary of the Interior authority to institute actions to defend the irrigation rights sold by the Reclamation Service. This would be certainly undertaking more



litigation than was contemplated in the Reclamation Act, or by any general authority conferred upon the Secretary of the Interior.

We regard the case of *In re Celestine*, 114 Fed. Rep. 551, in point, and under that case and the usual construction given to the foregoing statute we contend that the District Court of the Eastern District of Washington, Southern Division, had no jurisdiction of this case, and that there is no authority upon the part of the Secretary of the Interior to maintain it, and therefore that it should be dismissed.

### 3.

By the sixth and seventh assignments of error we raise the question that the officers signing the so-called statement or alleged agreement dated on the 21st day of October, 1905, had no authority to enter into and bind the appellant corporation thereby; nor had the corporation authority to bind the stockholders.

The defendant was organized by the farmers to distribute water to themselves (R. p. 89). The stock represents water, there are no profits, the water is distributed solely to shareholders, and the company is a distributing agency (R. pp. 95 and 96). The manner of increasing the stock and distributing the water, etc., is accurately and interestingly given by one witness without contradiction (R. pp. 142-143, 154-6, 158-160, and 161-163). The by-law (R. p. 163) does not change the condition, and it is evident that it was adopted in the forma-



tive period of the company before its real policy and status was settled. The fact is without dispute that water is distributed alone to shareholders on the basis of their stockholdings. It is a mutual water company.

Mutual water corporations are organized for the express purpose of furnishing water only to shareholders thereof, and not for profit or hire, and are not subject to public regulation. They are managing or distributing agencies for their shareholders. Their main purpose is the same as that of voluntary, unincorporated associations.

3 *Kinney on Irrigation and Water Rights*,  
Sec. 1480, p. 2659.

2 *Wiel on Water Rights* (3d ed.), Sec. 1266,  
p. 1170.

The shareholder owns the water right to a proportionate amount in the canal, and the share of stock is merely the evidence of his title.

3 *Kinney on Irrigation and Water Rights*,  
Sec. 1483, p. 2663.

2 *Wiel on Water Rights* (3d ed.), Sec. 1268,  
p. 1173.

*George vs. Robison*, 63 Pac. 819 (Utah).  
40 *Cyc.* 832, b.

It has recently been held that the directors of a mutual water company have no authority to release

or surrender any part of the physical property of the company, or to divert away from the ditch and waste any of the appropriated water of the company.

*Stuart vs. Davis*, 139 Pac. 577 (Colo.).

In an action to enjoin a private corporation from converting water the court has no power to adjudicate the rights of individual stockholders in the corporation who were not parties to the suit, their individual rights not being involved in the issues.

*Caviness vs. Le Grande Irrigation Co.*, 119 Pac. 731 (Or.).

While the defendant here is organized under the general corporation laws of the state, yet its character has become fixed by the very object of its organization, its method in the transaction of its business, and its practice and policy from the moment the organization was designed down to the present moment. No money dividends have ever been declared, no profits were ever sought, and no water has ever been delivered to any person other than a shareholder. The certificate of shares represents the interest of the shareholder in the whole flow of the canal in the proportion that his shares of stock bear to the whole number of shares. The appropriation of the water was made by the corporation constructing a canal, diverting the water from the river, and carrying it to the ditches of the shareholders, from which source the shareholders com-

pleted the appropriation by applying the water to their lands. The directors and other officers of the company are wholly without power to deprive the shareholders of water thus appropriated and applied. No one would doubt for an instant that the directors would be without power to alien the whole of this property or any such part of it as would interfere with the proper carrying out of the purposes for which the water was appropriated. Neither can they agree to donate or make a gift of such property. Neither can they agree for or without consideration to abandon to the public any portion of the appropriation needed by the shareholders.

“The office of the directors is to *manage* and not to *give away* the assets of the corporation. They have no power, by giving away its funds, to deprive it of any of the means to accomplish the purposes for which it was organized.”

3 *Thompson on Corporations*, Sec. 3995.

*Ultra vires* acts of directors do not bind the corporation or the stockholder, unless ratified, or unless circumstances of equitable estoppel exist.

3 *Thompson on Corporations*, Sec. 3999.

The corporation, by operation of law, is under contract with its stockholders to hold and manage the property and affairs of the corporation for the objects and purposes for which it was created, and for no other purpose.

*2 Clark and Marshall on Private Corporations, Sec. 539.*

*Rocky Ford etc. Co. vs. Simpson, 36 Pac. 638.*

The alleged agreement executed by the officers of the corporation bears date October 21, 1905. On December 21, 1905, at a called meeting of the stockholders of the Company, it was resolved to hold a called meeting on January 2, 1906, to discuss the subject matter of this agreement, and the sense of the meeting was found to be against the concession of any water rights (R. pp. 232-233). The called meeting was held on January 2, 1906, and a resolution was adopted that no action be taken to relinquish any water, which resolution was carried unanimously. Nor did the matter rest there. The Company notified the officer who had conducted the negotiations for the Government that it refused to be bound by the signed alleged agreement (R. p. 140). None of the stockholders ever assented to the alleged agreement after they had learned of it and its effect (R. pp. 147-148, 167, 168, 171).

It is a conceded fact in the record that the alleged agreement was not recognized by the Company or its officers and that the defendant continued to carry water to the full capacity of its ditch, and to deliver at its distributing head gates 4,000 inches of water according to its unit of measurement. The record bristles with this fact and condition. One further reference only will be made at this point (R. pp. 255, 267, 268). The act of the officers was not rati-



fied, but expressly disaffirmed, and the corporation and its shareholders did not, either by affirmative action or by laches, create any estoppel.

## 4.

For the purpose of argument we will consider the eighth, ninth, tenth, eleventh and twelfth assignments of error together. The United States has called the writing in question an agreement. We call it a statement or declaration of the rights of the appellant in and to the water of the Yakima River. It certainly is not an agreement. In its title, relinquishment is made to run to the public. This statement contains words which can indicate nothing else than that the Government does not seek thereby to appropriate any water released by the appellant, but that it is to rely upon the surplus waters of the flood season, which it proposes to store. Upon the face of it it shows that it was not intended that there should be any relinquishment of any water actually used.

The United States gained nothing in the way of transfer of water, nor was it seeking a grant of water, so that the United States was neither injured nor profited by the amount stated in the alleged agreement signed by the appellant, only insofar as there was a definite ascertainment of appropriated rights. As shown by the record, the mistake of a few second feet, while a great damage to the appellant, was of no detriment to the United States. The rights

of the United States, other than those purchased from the Washington Irrigation company, were based solely upon stored water. To these waters the defendant does not now and never has had any claim, though it claims its rights are superior to the rights of the Washington Irrigation company, as the appropriation of that company is subsequent to the appropriation of the appellant by several years.

In 1889 the record discloses that there were but few appropriations of water from the Yakima River, and in that year the farmers owning in small tracts of from forty to one hundred sixty acres the seven thousand acres of land irrigated by appellant corporation, concluded that they would construct this canal of sufficient size to irrigate this entire body. (R. pp. 90, 91).

The contracts for the construction of the canal and flumes call for the identical dimensions and capacity which the canal now is, and which it was in 1905. (Defendant's Exhibit 2.) R. pp. 94, 224 to 227). They began to take water from this canal in 1890, and in 1891 they had sufficient (R. p. 101). The United States cannot base its claim upon any priority, because none is alleged and there is no proof of any.

The stipulation shows that the Sunnyside Canal's first notice of appropriation was made in September 1890, and an amended appropriation in 1891. There is scattered throughout the record evidence showing that long prior to 1905 the farmers who constructed

the West Side irrigating ditch had placed seven thousand acres in cultivation, the amount now in cultivation, and applied to the beneficial use thereof the full amount of four thousand inches. Attention is called to plaintiff's Exhibit E, being a report of stream measurements for 1904, p. 111, where it is stated in the middle of the page that the irrigated area under this canal was then seven thousand acres, and on page 109 of the same document it is stated that the company is a co-operative association so the United States, through its Reclamation Service had full knowledge of the status of the appellant corporation. During the years of 1903 and 1904 the canal was not operated to its full capacity, because of numerous breaks and repair work.

In the year of 1905 on account of weak banks caused by late reconstruction and the filling in of the canal, the canal did not carry the full appropriation. The examination, however, of plaintiff's exhibits I and P disclose that some dates that year, the canal was carrying as high as 76 7-10 second feet, (which was much less than its normal capacity, because of weak banks that year) as disclosed by the record.

When this statement was made by Mr. Stevens, as Vice President of appellant company, the Government knew, because it was doing business through skilled engineers, that after making allowance for seepage, a diversion at the intake of the canal of 80 second feet of water would supply the

land of the users of water from the canal less than a half inch per acre, and that the hay and grain lands of that valley could not be profitably farmed with that volume of water and that every decree rendered in that valley in the last quarter century has permitted the use of one inch per acre as necessary.

The volume at all times remained the same size, from the first work in 1889, and the change in the head gate in 1909 did not increase the capacity of the ditch. (Ellison, R. p. 224).

The condition of the canal in 1904 and 1905 is shown on R. pp. 262 and 263. We have the repeated statements in the record of W. A. Stevens, Mitchell Stevens, J. N. Burch, Jeff H. Lee and H. G. McNeal that the capacity of the ditch was not increased in 1909, as well as the ever-present fact that the canal was originated to irrigate seven thousand acres and that it flumes had been of unvarying dimensions, and that seven thousand acres had, prior to the year of 1905, been irrigated from it. Now this being the situation, is it reasonable to believe that the farmers under this canal or that the officers signing this statement intended to give up any part of the water that made their land valuable when it will be seen that they had a first right to water sufficient to irrigate it to the fullest extent and had a ditch large enough to carry the water? Why was this statement made that the appropriation of the West Side Irrigating company was during the time mentioned



to be 80 cubic feet per second? Does the court think that these people intended to relinquish any water they needed? In view of these conditions, how shall we construe this act?

We contend that the proper construction of its was that Mr. Stevens intended in behalf of the company of which he was Vice President, to declare to the United States and the public generally, that the appellant would not take any more water from the river than it could actually put to a beneficial use upon its lands, and carry through its flumes, and he erroneously believed this was 80 second feet, and we insist that this was not in the nature of an agreement and we also insist that the acts of the United States afterwards in expending money, was not a consideration for this act, and was not intended so to be.

We think that this act or declaration of Mr. Stevens' assuming that it is binding upon the corporation, which we deny, or upon the individual owners of land under the ditch, which we deny, amounted to a declaration in the nature of an abandonment founded upon a mistake, and which was never acted upon by anybody to their injury, including the United States.

In fixing the amount at eighty second feet we think that there is unmistakable proof that it was believed by Mr. Stevens and his associates that the eighty second feet of water equaled four thousand inches of water in accordance with their own peculiar meas-

urement, and we think that the Government officer, or whatever engineer reduced the amount of four thousand inches to second feet, assumed, without examining closely into it, that the measurement of the Appellant was the ordinary measurement under four inches pressure over the center of the opening.

Measured under a four inch pressure *over the center of the opening*, fifty inches so measured does equal one cubic foot per second of time, and this undoubtedly was the measurement which the engineer of the Government assumed to be the measurement of the Appellant when the engineer reduced the four thousand inches to eighty second feet, but the Appellant's canal company, while probably thinking it had adopted the measurement of water under a four inch pressure had adopted and were using an entirely different measurement.

It has been described heretofore in the language of Mr. Anderson, the engineer, and will be found as described by him on p. 109 of the Record, and on p. 111 of the Record he reduces four thousand inches as measured in this way to second feet, making it ninety and four tenths second feet. Now it will be remembered that Mr. Anderson's testimony is not disputed. No one else has described the manner in which the Appellant actually measures water, but Mr. Anderson, and his computation showing that four thousand inches measured in accordance with Appellant's measuring boxes equals ninety and four-tenths second feet is not in any way disputed.

The difference between these measurements, that is, the measurement under four inches pressure above the center of the orifice and the measurement of Appellant is this: In the module in use by the West Side Irrigating Company the pressure is measured four inches from the top of the orifice, while in the measurement under four inches pressure, which makes fifty inches equal one cubic foot, the pressure is measured from the center of the orifice.

One of the things that clearly demonstrates that there was a mistake in fixing the amount of water is the fact that this eighty cubic feet per second, measured at the intake in accordance with the lower court's decision would have left the water users short of their needs. It cannot be conceived that a body of farmers who have struggled as these men have to obtain valuable property would give it away without any consideration.

Mr. Anderson, on R. pp. 113, 114 and 115, testifies to the loss by seepage from Appellant's canal, and on R. p. 116 he shows that the loss by seepage is fourteen second feet. The exact language of Mr. Anderson is as follows:

(Testimony of E. I. Anderson.)

The records that I have been citing you are the results of the twelve observations in this canal. The results of the twelve observations show that in the manner in which they were distributing water in their canal, that in order to deliver four thousand

inches of water at the head of the various laterals there it would require about 102—as the figures are here—102.1 second feet to be diverted from the river to do that. The result of thirteen investigations carried along the same line gave a result of 104 second feet to be taken from the river.

Q. Mr. Anderson, from your knowledge of the country there, the formation and so forth, where does this seepage water go to; where must it necessarily go?

A. It must find its way back into the river.

Q. In the Yakima River?

A. The Yakima River. No question about it.

It will also be seen that the 14 second feet seepage runs back into the river and certainly it is unjust to the appellants under the circumstances not to credit this amount to them; if they are only entitled to 80 second feet at the intake they certainly should be credited with this 14 second feet that runs back into the river. This is not lost to the Reclamation Service for the reason that it runs back into the Yakima River 40 miles above the intake of the Reclamation Service's two largest projects; The Sunnyside Canal and the Wapato project, and therefore this water is used by the Reclamation Service in its Sunnyside project and its Wapato project, yet the appellant is deprived of it and it is charged against its rights.

Now, we beg to be pardoned for diverting at this



point for a moment to remark that in view of the public spirit evinced by the appellant corporation in so magnanimously agreeing to a declaration of their rights and taking into consideration the child-like simplicity in which they placed their confidence in the Governmental Agencies, we think that it is extremely harsh now for so strict a rule to be invoked against them as is invoked in this decree of the lower court, to not at least credit them, out of their meagre 80 second feet, with the 14 feet which directly runs back to the river, and we can't think that the equity which we so much revere, when thoroughly considered by this court, will permit of any such decree continuing in this case.

Now returning again to the direct question under consideration, Mr. Noble, the Government engineer, told these people that 80 second feet was the equivalent of four thousand inches. It was their purpose to hold all water which they had actually appropriated and needed (McNeal R. pp. 75, 76; M. Stevens, pp. 84, 85, 86; Lee, pp. 115, 116, 117).

Q. Would 80 second feet, as you afterwards came to understand it, supply your needs and appropriation?

A. No, sir.

Q. Was there any intention on your part or the part of any one else to limit yourself to any less water than you were entitled to?

A. No, sir. We did not think we were giving away any water. (R. p. 85).

It was in the year 1906, or possibly 1907, that Mr. Noble notified the ditch company that they must not divert more than the amount stated in the agreement. In the meantime the company had learned of the mistake and declined and ever since have declined to abandon any use of the water (R. pp. 87, 88).

"A. We only knew of measuring laterals where the water was being taken from the canal. Never had in mind taking readings anywhere else.

Q. And what was your understanding of the amount you were to have at those places?

A. We were to have 4,000 inches, what Mr. Noble agreed to give us, as we understood it, and at that time I had never heard of a miner's inch or an inch per second and as I understood it at this meeting we was to get 80 cubic feet per second which represented 4,000 inches measured out to us at all times." (R. p. 115).

"Q. What Mr. Noble said was that he wanted to ascertain the actual needs of the people who were irrigating from the river, is that it?

A. That was my understanding.

Q. And that they had to find out what the different irrigators were going to insist upon before they could go ahead with their work?

A. No, sir. He didn't seem to be at all particular; he wanted to know only approximately so that

they might go ahead with their work." (R. p. 118).

Mr. Lee, who gave the last above testimony, was one of the defendant's trustees at the time the agreement was made. Mr. Stevens was the Vice President who signed the agreement.

It is a well-settled rule, that in suits for the enforcement of agreements, parol evidence and mistake may be offered defensively, and the defendant may show that through the mistake of both or either of the parties, the writing does not express the will of the agreement, or that the agreement itself was entered into through a mistake as to its subject matter or as to its terms.

2 *Pomeroy's Equity Jurisprudence*, Sec. 860, p. 1192.

Exhaustive note to

*Rudisill vs. Whitener*, 15 L. R. A. (N. S.) 81.

*Murray vs. Sanderson*, 62 Wash., 477, and cases cited at 481.

Now, discussing the alleged agreement or as we call it, statement, from the view point of its being considered as an abandonment, the appellant's appropriation during the months mentioned being a diversion of 80 second feet at the mouth of appellant's canal, the effect of this would be that appellant's officers abandoned 10 4-10 second feet of water for use and 14 second feet to cover the loss by seepage, so that the appellant would receive only 66

second feet at the mouth of its distributing canals or making a total loss of more than 24 second feet out of 90.4 second feet. No such abandonment was certainly intended. These farmers and the officers certainly did not intend to do anything which would prevent them from using the amount of water which was required and for which they had, at great expense, constructed flumes and a canal bed to carry.

Our supreme court, in the case of Wendler vs. Woodward, not yet reported, but found in 52 Decisions, No. 2, p. 4, has decided that abandonment is a question of fact and intent. Certainly the appellant did not intend to abandon their needed water, for the effect of this would be to render part of their lands worthless, and to cause a loss of the construction of their ditch to the size that was necessary to carry the water which they needed, because much smaller flumes, therefore much less expensive flumes would carry the water given to them under the decree of the lower court.

The facts show that after this alleged agreement was entered into they went on using all of the water they needed, so as a matter of fact they didn't abandon it. Therefore, in this case we neither have the fact of the abandonment or the intent to abandon, and we think that if nothing else were in this case to cause a reversal of it, a careful consideration of the law of abandonment as applied to water rights, and the facts in this case, would demonstrate to the court that there never was any abandonment.



We invite the court's attention carefully to the law of abandonment as applied to water rights:

An abandonment is an intentional relinquishment of a known right. It is the relinquishment of a right by the owner with the intention to forsake or desert that right.

2 *Kinney on Irrigation and Water Rights*, Sec. 1101, p. 1979, and cases there cited.

1 *Wiel on Water Rights*, (3 ed.) Sec. 567, p. 604.

"To constitute an abandonment of a water right, there must be a concurrence of the intention to abandon it and an actual failure in its use."

*Hough vs. Porter*, 51 Or. 318.

"Abandonment, like appropriation, is a question of intent, and to be determined with reference to the conduct of the parties. The intent to abandon and an actual relinquishment must concur, for courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region."

*Miller vs. Wheeler*, 54 Wash. 429.

An abandonment is always voluntary, and a question of fact.

1 *Wiel on Water Rights*, Sec. 567.

Where the preponderance of the evidence in any particular case shows that the appropriator con-

tinued in the use of his rights, no abandonment will be decreed against him by the court. The evidence in any particular case where an abandonment is decreed must be clear and satisfactory if such, in fact, was the case.

2 *Kinney on Irrigation and Water Rights*.  
Sec. 1116, p. 2013 and cases there cited.

Of course, wherever the defendant's mistake was induced or even made possible by the acts or omissions of the plaintiff, then, on the plainest principles of justice, such an error prevents an enforcement of the agreement. Such co-operation in the mistake, however, is not at all essential. A mistake which is entirely the defendant's own, or that of his agent, and for which the plaintiff is not directly or indirectly responsible, may be proven in defense. This is, indeed, the very essence of the equitable theory concerning the nature and effect of mistake.

2 *Pomeroy's Equity Jurisprudence* (2d. ed.)  
Sec. 860, p. 1193; Sec. 863, p. 1211.

Recurring to the effect of this declaration or alleged agreement, we invite the court's attention to the fact that the instrument does not state where this water is to be measured and in view of the important bearing because of the great seepage in the canal, of the place of measurement, we think that the uncertainty is so great as to prevent the declaration or alleged agreement from having any effect

whatever. The parties' minds never came together on the amount of water for this reason.

The court arbitrarily fixed in the decree, the measurement without any proof of seepage, either above or below it. It is plain that neither parties ever intended the water being measured in this place, or ever agreed upon it being measured there, for there was no agreement upon the subject. The appellant had been measuring its water in its canal exclusively at the intakes of the laterals.

The Government had measurements upon the canal during 1904 and the irrigating season of 1905 as follows: It had one at the Gordon flume, a mile from the intake at the river, and it had a gauging station at Lachman's place about three miles from the intake.

There was no measurement ever taken at any time by anybody, at the place where the court finally determined that the water should be measured. As a matter of fact not appearing in the record, the place of measurement is in the brush above the Gordon flume, which would mean a greatly increased loss to the water users, beside the added expense of constructing a measuring flume.

As illustrating the general uncertainty and lack of knowledge of the water users of the effect of this alleged contract or declaration, and their ignorance as to the meaning of second feet, we quote a few excerpts from the testimony of the water users. Thus, Mr. H. G. McNeal says:

“We supposed that this second foot amounted to the same measurement that we were already using. I don’t know anything about measuring water in second feet at all.” R. pp. 135 and 136.

Jeff H. Lee, one of the water users and stockholders, says:

“We only knew of measuring water at the laterals where the water was being taken from the canal; never had in mind taking readings anywhere else. We were to have four thousand inches, what Mr. Noble agreed to give us, as we understood it at that time. I never had heard of a miner’s inch or an inch per second, and as I understood it at this meeting we were to get 80 cubic feet per second, which represented four thousand inches measured out to us at all times.” (R. pp. 166 and 167).

The same witness on p. 169 said that he understood that Mr. Noble made the paper to ascertain the actual needs of the people who were irrigating from the river. And Mitchell Stevens, the Vice-President who signed the declaration or alleged agreement, on p. 97 R. testifies:

“Q. Did you or your company ever deal in water according to second feet basis?

A. No, sir.

Q. What was the term you always used relative to water?



A. Inches—miner's inches, I think.

Q. Miner's inches?

A. Yes sir.

Q. And then you adopted a box, and whatever that measured you called that inches?

A. Called that inches, yes sir; that is all we knew."

And again, Mr. Stevens testified on pp. 138 and 139 of the record as follows:

Q. Now, upon what were you proceeding when you put in there the term "eighty second feet," and how you came to limit yourselves to that amount.

A. Well, we had been led to believe that 80 second-feet was equivalent to four thousand inches of water as we measured that water.

Q. And therefore instead of using the term four thousand inches you used the term eighty second-feet? A. Yes, sir.

Q. Under that construction to you?

A. Yes, sir.

Q. *Would eighty second-feet, as you afterwards came to understand it, would that supply your needs and appropriation?* A. No, sir.

Q. Was there any intention on your part or the part of anyone else to limit yourselves to any less water than you were entitled to?

MR. BURR.—We object to the question as leading.

A. No, sir. We did not think we was giving away any water. The stockholders had understood, or at least I [86] understood, I can only speak for myself, that we were entitled to four thousand inches of water from the river—that we were entitled to use four thousand inches of water measured out to us, as we understood water measurements. That was our idea of this matter. *We had always, for years and years, had always understood we were to have four thousand inches of water, that that amount of water would be necessary to irrigate our land.*

Q. Where were you measuring the water, at what point?

A. At our laterals, where they left the ditch.

Q. Had you any measuring box at the head of your canal? A. No, sir.

Q. Had you any knowledge as to the amount of water that came in or means of measurement?

A. No, sir, we did not know how to measure it.

Q. Were you present when Mr. Anderson was testifying here, or had you come in at that time?

A. No, sir.

Q. Those measuring-boxes which Mr. Anderson observed and examined when he was there in 1912

and 1913, did they or did they not fix your unit of measurement—in other words, was that the way you were accustomed to measuring water?

A. Yes, sir. That is the only measurement we knew.

The 13th and 14th assignments of error will be discussed together. The argument presented as to the first assignment of error applies here. The record no where discloses that the United States had performed the conditions of the alleged agreement to such an extent that it needed this water and it is not shown that a single acre of land irrigated from its constructed project had suffered on account of the loss of water because of the act of the appellant in using the water which it is admitted it used in excess of eighty cubic feet at the intake, as provided in the decree of the lower court. Not a single water user under any of the Reclamation projects testified that he had ever suffered for the want of water at any time.

The rule that applies to controversies between individuals applies here. It is well established that in order that an appropriation of water may be sustained, that there must be an intention to appropriate a certain quantity of water and that this quantity must be actually used or there must be the exercise of reasonable diligence in preparing the land for its use. The cases sustaining this doctrine are numerous, the latest being *Colburn vs. Winchell*, 93 Wash. p. —; 51 Advance Dec. 254; 160 Pac. 1052.

The only water being furnished by the Reclamation Service at the present time or at any time since its creation in the Yakima Valley, is that which is furnished to the Tieton unit, and that which is being furnished to the Sunnyside unit. That furnished to the Tieton unit comes out of the Tieton River, which through the Naches River flows into the Yakima, just above the city of North Yakima, and some forty-seven miles down the Yakima River from the intake of appellant's canal. The Sunnyside unit comes out of the Yakima River below the city of North Yakima, and over fifty miles down the river from the intake of appellant's canal.

The Sunnyside unit has an appropriation from the natural flow of the Yakima River of 650 cubic feet per second, to irrigate forty thousand acres of land. Originally the Washington Irrigation Company filed an appropriation of 1054 second feet from the Yakima River, but said Washington Irrigation Co. agreed with the Reclamation Service prior to the time the Reclamation Service purchased its rights, to limit its appropriation to 650 second feet. For all of the above statements see R. p. 62, being a stipulation between the plaintiff and defendant as to certain facts.

At fifty inches to a cubic foot per second this would give the Sunnyside unit 32,500 inches of water under a four inch pressure, which would be approximately an inch to the acre. The 80 cubic feet awarded to the appellant by the lower court,



even if all of it were run into the laterals of the water users, would aggregate upon this basis, four thousand inches, or a little over a half inch per acre to the seven thousand acres of land required to be irrigated; or putting it another way, appellant would have to have 113 second feet at its intake to equal the Sunnyside reservation of 650 second feet.

And here we wish to call the court's attention to this comparison, and it shows of itself that there was a mistake on the part of appellant and the Government in fixing 80 cubic feet as the amount used by the appellant; therefore we contend that upon the evidence the Government has not made out a case for injunctive relief.

The use which the Government proposes to make of this water is the identical use which the water users of the appellant have been making of it since 1889 and to deprive them of that use is to work an injury to them without any corresponding benefit of the Government. The Government practically seeks to take away one fourth of the appropriation necessary to irrigate the land of the stockholders of the appellant and the effect of this is to deprive them of one fourth of their outlay and efforts for a period of more than a quarter of a century, and to bestow their appropriation upon those who are yet to contract with the Government; and besides this, it decreases the value of their land to the extent of one fourth, because these lands are of no value without water and if this decision is affirmed, at least one

fourth of this seven thousand acres of land owned by the stock holders of the appellant will again become a desert.

## 6.

The 15th assignment of error raises a question peculiar to the property rights in the state of Washington, relating to husband and wife. Section 5918, Remington & Ballinger's Annotated Codes and Statutes of Washington is as follows:

"The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife; Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon. (Cd. '81, 3410; 1 H. C., 1400)."

Under this statute it has been held in many cases beginning with the case of Holyoke vs. Jackson, 3d Wash. Terr. 235, that a husband can not in any way affect the title of the wife to real property, without

she joins in the conveyance or in the act by which property is conveyed. Among the first cases of the Supreme Court of this state on this point is the case of *Graves vs. Smith*, 7 Washington, 14.

There has been no testimony here showing that any of the wives of any of the water users or any of the owners of this seven thousand acres of land have in any way acquiesced in the release to the Government of any of the water that was ever at any time appurtenant to the said lands. It needs no authority to sustain the proposition that water is an appurtenant to irrigated lands. Therefore, if this alleged agreement is given the effect claimed for it by the United States, it is void because it is not shown that the wives of the stockholders of this corporation have in any way consented to such a relinquishment, or in any way ratified the same.

## 7.

We will discuss the assignments of error from the 16th to the 24th inclusive, together, as they more or less are connected with each other. More or less argument heretofore, applies to each of these assignments, and will not be repeated, as a party dealing with an agent must, at his own peril, learn his authority, the United States in this case must be regarded as knowing that the trustees did not have authority to make any agreement releasing the rights of the water users and land owners for whom the appellant carried water. The appellant was simply a carrier of water. The appropriators of

water were the owners of the land. Had the stockholders ratified by silence even, the act of appellant's officers, authority for their acts would have been inferred, but the acts of the officers in signing this alleged agreement were promptly disaffirmed; and it must be remembered that no benefits were received by appellant and therefore nothing had to be returned before the act could be disaffirmed.

The alleged agreement purports to have been signed on October 21st, 1905. It is shown in the testimony on R. pp. 146, 147 and 148 that on December 21st, 1905, at a meeting of the trustees of appellant and officers, a resolution was passed declaring that the sense of the meeting was found to be against any concessions of water rights to the Government, and a general meeting of the stockholders was called for January 2, 1906. Such a meeting was held on January 2, 1906, and the following resolution was passed.

“Moved by W. A. Stevens and seconded by Goodman, that no action be taken to relinquish any water at this time.”

Certainly this shows that the stockholders were not ratifying any unauthorized act of its trustees or officers. If this alleged agreement between appellant and the public is to be of any effect it must have the effect of either conveying or relinquishing an interest in real estate.

While usually a corporate seal is not required to



simple contracts, the law of the state of Washington requires any instrument of a corporation to be witnessed by the official seal of an officer. Remington & Ballinger's annotated codes and statutes of Washington, Sec. 8761½, is as follows:

"Certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall be sufficient:

State of ..... }  
County of ..... } ss.

On this .....day of.....,  
A. D., 19..., before me personally appeared  
....., to me known to be the  
(president, vice-president, secretary, treasurer  
or other authorized officer or agent, as the case  
may be) of the corporation that executed the  
within and foregoing instrument, and acknowl-  
edged the said instrument to be the free and vol-  
untary act and deed of said corporation, for the  
uses and purposes therein mentioned, and on  
oath stated that he was authorized to execute  
said instrument and that the seal affixed is the  
corporate seal of said corporation.

In witness whereof, I have hereunto set my  
hand and affixed my *official seal* the day and  
year first above written.

.....  
(Signature and title of officer).

It will be seen that under this statute the alleged agreement is of no force or effect, and is not binding upon the corporation.

In addition to what has been said and referred to in connection with the misunderstanding of the parties to this arrangement, we wish to call the court's attention to the testimony of Mitchell Stevens, found on page 138 of the record:

"Q. Would eighty second feet, as you afterwards came to understand it, would that supply your needs and appropriation?

A. No, sir.

And again on page 139 in answer to a question stated the following.

A. We had always, for years and years, had always understood we were to have four thousand inches of water, and that that amount of water would be necessary to irrigate our land. And on page 140, again stated:

A. We were notified by Mr. Noble that we had to accede to the amount of water that we had been limited to and he left instructions to turn that water off. We found out that we would have less water than we were using and we refused to do it."

And again, as to what W. A. Stevens says, see Record, page 97:

Q. The unit of measurement that you used was the inches measurement?

A. The same as was used on the Manashtash.

Q. I will ask you this question; from your knowledge and long acquaintance there on the West Side and knowledge of the conditions is the amount of 4000 inches according to the measurement of inches which you use, a needed amount when measured out through the measuring box, taken out of the canal, a necessary amount for the proper irrigation of this land lying under the canal?

A. I doubt very much if it is sufficient amount to irrigate all of the lands when put under cultivation.

Q. You doubt that it is sufficient? Then your answer would be that the full amount of 4000 inches measured at that place and in that manner is necessary?

A. You mean through our measuring boxes?

Q. Yes.

A. Oh, yes sir.

On page 111 the testimony of E. I. Anderson:

Q: How many second feet would four thousand inches measure under these farmers' way of measuring, what amount of inches converted into second feet?

A. I don't know whether I can answer that off hand or not. I think I can find it in the report here.

Q. Yes, refer to your report and find your figures.

A. The value of four thousand inches, as measured by the West Side Irrigation company in the distribution of water in the operation of their canal is the equivalent of 90.4 second feet, according to the calibration of their boxes."

And again, to the testimony of H. G. McNeal, page 129 of the record:

"A. Well, my understanding was that the 80 cubic feet was the equivalent of four thousand inches of water, the equivalent of four thousand inches as we measured water.

Q. How was that?

A. The 80 cubic feet we were told by the Government was the equivalent to four thousand inches of water as we measured water.

Q. How did you measure it?

A. The only place we measured it was at our various measuring places where we delivered water.

Q. That is, as I understand you, by this term of 80 second feet or 80 cubic feet, you intended to limit your appropriation from the Yakima



River to the actual amount of water that you had been using through your canal?

A. Yes sir, not to exceed four thousand inches at the low stages of water."

Now, in conclusion, and particularly in summarizing the views from the foregoing, this alleged agreement is unconscionable if it is given the effect that the lower court gave it. We call the court's attention to the following fact, that

This suit is not brought for the purpose of establishing a priority, wherein he who is first in time is first in right. The bill of complaint discloses that it is, in effect, a proceeding for the specific performance of a contract, through a decree requiring the defendant to perform the agreement alleged. All rights, equities and titles are claimed to have been merged into this agreement and its specific performance is claimed. It is charged that the defendant has diverted and is diverting large quantities of water in excess of the amount fixed by the agreement, and will continue so to do to the great and irreparable damage of the plaintiff. (Paragraphs VIII and IX of amended bill of complaint.) It is charged that plaintiff can make, and, under the withdrawal and authorization fixed by the act of the legislature, is making beneficial use of the natural flow of the river, by delivery thereof to persons and corporations contracting with *and to contract with plaintiff*. (Paragraph X.) It is nowhere urged, alleged, claimed, asserted or established,

either in pleading or in the evidence, that the defendant was not entitled to the full amount of water which it was diverting at the time of the commencement of this suit. It is not alleged that on the 21st day of October, 1905, the defendant was not entitled to a greater amount than the 80 second feet set forth in the agreement, but only that it limited itself to that amount.

That the alleged agreement made by the officers of this company is an unfair and inequitable one, and would not have been entered into by them except through mistake and ignorance of their rights, cannot be doubted; and that the relief here sought is harsh and oppressive upon the defendant and its stockholders, is beyond just dispute. If we were dealing with private parties as adversaries, we would not hesitate to charge that by concealment and by undue advantage of a situation an unconscionable agreement was affected. But waiving such a charge and under the circumstances here, it is no answer that the contract is not illegal, and that no defense could be set up against it at law, or that it possesses no features or incidents which would authorize a court of equity to cancel it upon full execution, but rather, where specific performance is sought, as here, plaintiff must come into court asking for such relief as will not be oppressive or work injustice.

“He who seeks equity must do equity. The doctrine, thus applied, means that the party

asking the aid of the court must stand in conscientious relations towards his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant; \* \* \* and when the contract itself is unfair, one-sided, unconscionable or affected by any other such inequitable feature, and when the specific performance would be oppressive upon the defendant or would prevent the enjoyment of his rights or would in any other manner work injustice, specific performance will always be refused."

1 *Pomeroy's Equity Jurisprudence*, Sec. 400, p. 544.

If there were present here, on the part of the defendant or its stockholders, an intent to speculate or a purpose to derive an unfair advantage, or any act which runs counter to the wholesome conduct and purpose of many years, then the equities would be different. Or, if the unimpeachable facts did not show a valid appropriation with no intent to abandon it, and a careless yielding to the beguiling and plausible estimate of a promoter of a government enterprise, then the contention we are now making would not be seriously urged. If the contract was a legal one, and if it had been made understandingly, and if it had been made upon a just consideration, and if its non-enforcement would work an injury to those with whom the contract was



made, then its one-sided and unfair character would not exist. But in this matter no advantage was to accrue to the stockholders of this company, since they only desired to co-operate on fair and equal terms with the government of the United States. In the language of one witness, the people of the valley were enthusiastic because Mr. Noble stated that large works would go forward if they could get to an understanding of how much water belonged to those living below the West Side canal, and the amount of water it would be necessary to store at the lakes. (R. p. 167.) And now, after mistake has been made in the carrying out of their generous views, this contract is sought to be held against them without the United States extending the same generous consideration in return.

To hold these people to 80 second feet of water at the mouth of the canal is to make them stand the seepage, without credit, though it runs directly back into the river. That this seepage does so return is not disputed in the record. It is a physical condition which needs no proof that, in addition to the seepage loss, the water which is stored in the soil by irrigation in a very large measure returns to the river, especially where the irrigation is along the very banks and reaches of the river, as in this case. It is common knowledge that the return flow to the Yakima River from irrigation is of such volume that the lower canals on the Yakima River in Benton County are not required to take into consideration diversions and appropriations above. From



every point of view, the loss to the defendant is great and immediate, if the prayer of the complaint be granted, while the benefit to the plaintiff is doubtful, indirect and may never occur.

The complainant must come in with clean hands; and a contract will not be enforced when equities exist on the other side which would render it unjust to grant the relief, or where it is not clear that the minds of the parties have come together.

*Bispham's Equity*, Sec. 376.

“Nor will a court of equity enforce a contract according to its terms, when to do so would be to violate the real object of the contract in the minds of the parties when the contract was made, and produce a result not contemplated at the time of the execution of the agreement.”

*26Am. & Eng. Enc. Law*, 2d ed., p 68.

*Rudisill vs. Whitener*, 15 L. R. A. (N. S.) pp. 88-90.

Now, as a final word, we plead with all of the earnestness at our command, that the bill of the plaintiff should be dismissed, or at least that the defendant be not restricted to a less amount than a diversion of 104 4-10 second feet at the Gordon flume, which means a distribution at the intake of the laterals of the appellant of 90 4-10 second feet

of water, which is equivalent to four thousand inches as measured out by the defendant to its stockholders.

Respectfully submitted,

H. J. SNIVELY,  
Attorney for Appellant.

Post Office Address,  
North Yakima, Washington.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

JOSEPH PABLO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Transcript of Record.**

Upon Writ of Error to the United States District Court of the  
District of Montana.





**United States**  
**Circuit Court of Appeals**  
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District of Montana.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

B. K. WHEELER, Esq., U. S. Attorney, of Butte,  
Montana;

HOMER G. MURPHY, Esq., Assistant U. S. Attorney,  
of Helena, Montana;

FRANK WOODY, Esq., Assistant U. S. Attorney,  
of Butte, Montana;

Attorneys for Plaintiff and Defendant in  
Error.

ALBERT BESANCON, Esq., of Missoula, Montana;

JOHN P. SWEE, Esq., of Ronan, Montana;

Attorneys for Defendant and Plaintiff in  
Error. [1\*]

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*In the District Court of the United States in and for  
the District of Montana.*

No. 2732.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JOSEPH PABLO,  
Defendant.

BE IT REMEMBERED, that on the 28th day of  
October, A. D. 1915, the Grand Jury of said court pre-  
sented an Indictment against the defendant herein,  
in the words and figures following, to wit: [2]

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\*Page-number appearing at foot of page of original certified Trans-  
script of Record.

**Indictment.**

United States of America,

District of Montana,—ss.

In the District Court of the United States within and for the District of Montana, of the September term of said District Court held at Butte, Silver Bow County, in said District of Montana, in the year of our Lord one thousand nine hundred and fifteen.

The grand jurors of the United States of America, duly impanelled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States, within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Joseph Pablo, late of the State and District of Montana, on the 6th day of September, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquor, commonly called whiskey, in quantity about one quart, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the state and district of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and



provided, and against the peace and dignity of the United States of America.

## SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pablo, late of the State and District of Montana, on the 5th day of September, A. D. 1915, at and within [3] the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquor, commonly called whiskey, in quantity about three quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

## THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pablo, late of the State and District of Montana, on the 5th day of October, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous

and intoxicating liquor, commonly called whiskey, in quantity about four quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

B. K. WHEELER,

United States Attorney, District of Montana.

HOMER G. MURPHY,

Assistant U. S. Attorney, District of Montana. [4]

[Indorsed]: No. 2732. United States District Court, District of Montana. United States of America vs. Joseph Pablo. Indictment, a True Bill. W. F. Noyes, Foreman of Grand Jury. B. K. Wheeler, U. S. Attorney, District of Montana. Homer G. Murphy, Assistant U. S. Attorney, District of Montana. Witnesses: John Lamoose, Henry Matt, John Matt, Harry Pritchett, Lucy Kirkpatrick, Napoleon Demontier, R. J. Holland, Harry Haines, Frank Kirkpatrick, Lawrence Pritchett, Phil Hull, Chas. Stevenson, Chas. Hunter, Andrew Gilbeau, J. W. Ramsey, Octave Couture. Presented by the Grand Jury in Open Court, by their Foreman, in Their Presence, and filed this 28th day of Oct. A. D. 1915. Geo. W. Sproule, Clerk.

Thereafter, on March 7, 1916, a Bench Warrant for said defendant was duly issued, in the words and figures following, to wit: [5]

**Bench Warrant.**

United States of America,  
District of Montana,—ss.

To the Marshal of the United States of America, for the District of Montana, and his Deputies, or any or either of them, Greeting:

WHEREAS, at a District Court of the United States of America, for the District of Montana, begun and held at the city of Butte within and for the District aforesaid, on the 28th day of October, in the year of our Lord one thousand nine hundred and fifteen, the Grand Jurors in and for the said District, brought into the said court a true bill of indictment against Joseph Pablo for violation of section 2139 as amended, as by the said indictment, now remaining on file and of record in said court, will more fully appear; to which Indictment the said Joseph Pablo has not yet appeared or pleaded:

NOW, THEREFORE, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Joseph Pablo and him bring before the said Court, at the United States District courtroom, in the Federal Building at ————, Montana, to answer the Indictment aforesaid.

WITNESS, the honorable GEO. M. BOURQUIN, Judge of the United States District Court, for the District of Montana, and the seal of said District

Court, this 7th day of March, in the year of our Lord one thousand nine hundred and sixteen and of our Independence the 140.

[Seal]

GEO W. SPROULE,  
Clerk.

[Endorsed]: No. 2732. United States District Court, District of Montana. United States of America vs. Joseph Pablo. Bench Warrant. Bail Fixed at \$250. Filed Mar. 11th, 1916. Geo. W. Sproule, Clerk. [6]

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**Return on Service of Writ.**

United States of America,  
District of Montana,—ss.

I hereby certify and return that I executed the within warrant by arresting the within-named Joseph Pablo on the 8th day of March, 1916, at Missoula, in Missoula County, State and District of Montana, that on the same day I conducted him before Wallace P. Smith, U. S. Commissioner at Missoula, Montana, who admitted him to bail to appear at Great Falls, Montana, March 14th, 1916, whereupon I released said Joseph Pablo.

JOSEPH L. ASBRIDGE,  
U. S. Marshal.

By J. W. Rickman,  
Deputy. [7]



Thereafter, on March 14th 1916, defendant was duly arraigned, pleaded not guilty and the case was set for trial, the journal entry thereof being as follows, to wit:

*In the District Court of the United States, District of Montana.*

No. 2732.

THE UNITED STATES

vs.

JOSEPH PABLO.

**Arraignment and Plea.**

Defendant with his attorney, John P. Swee, Esq., present in court, and being arraigned the defendant answered that his true name is Joseph Pablo; and thereupon indictment read to defendant; and thereupon defendant pleaded that he is not guilty and plea entered. Thereupon case set for trial at Missoula, April 13, 1916.

Entered in open court, March 14, 1916.

GEO. W. SPROULE,

Clerk. [8]

Thereafter, on April 14, 1916, the Verdict of the jury was duly filed herein, being in the words and figures following, to wit:

*In the District Court of the United States, District of Montana.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in count three of the Indictment, and not guilty as to count one and two.

H. H. MONTGOMERY,

Foreman.

Filed April 14, 1916. Geo. W. Sproule, Clerk.  
By C. R. Garlow, Deputy.

---

Thereafter, on April 17, 1916, Judgment was duly entered herein, in the words and figures following, to wit: [9]

*In the District Court of the United States, District of Montana.*

No. 2732.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

### **Judgment.**

The United States Attorney with the defendant and his counsel present in court.

The defendant was duly informed by the court of the nature of the charge against him, for the offense of unlawfully and feloniously introducing spirituous and intoxicating liquors into the Flathead Indian Reservation in the State and District of Montana, committed on the 5th day of October, 1915, at and within the State and District of Montana, as charged in count three of the indictment herein; and of his indictment, arraignment and plea of not guilty, and of his trial and the verdict of guilty as charged in said count three of said indictment.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas, the said defendant having been duly convicted in this court of the offense of unlawfully and feloniously introducing spirituous and intoxicating liquors into the Flathead Indian Reservation in the State and District of Montana, committed on the 5th day of October, 1915, at and within the State and District of Montana, as charged in count three of the indictment herein;

It is therefore considered, ordered and adjudged that for said offense you, the said Joseph Pablo, be confined and imprisoned in the Missoula County Jail

at Missoula, Montana for the term of seventy-five days, and that you pay a fine of One Hundred Dollars, and costs taxed at Two Hundred Ninety-four and 10/100 Dollars, and be confined in said County Jail until said fine and costs are paid or you are otherwise discharged according to law.

Judgment rendered and entered this 17th day of April, 1916.

GEO. W. SPROULE,  
Clerk.

ATTEST a true copy of Judgment:

GEO. W. SPROULE,  
Clerk.

By C. R. Garlow,  
Deputy Clerk. [10]

---

**Certificate to Judgment-roll.**

United States of America,  
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed, constitute the Judgment-Roll in the above-entitled action.

Witness my hand and the seal of said court at Missoula, Montana, this 17th day of April, A. D. 1916.

[Seal]

GEO. W. SPROULE,  
Clerk.

[Indorsed]: Title of Court and Cause. Judgment-roll. Filed April 17, 1916. Geo. W. Sproule, Clerk. [11]



Thereafter, on June 30, 1916, defendant's Bill of Exceptions, as settled and allowed, was duly filed herein, in the words and figures following, to wit:  
[12]

**Names and Addresses of Attorneys of Record.**

BURTON K. WHEELER, Esq., United States Attorney, HOMER G. MURPHY, Esq., Assistant United States Attorney, both of Butte, Montana,

Attorneys for the United States, Plaintiff.

ALBERT BESANCON, Esq., Missoula, Montana, JOHN P. SWEE, Esq., Ronan, Montana,

Attorneys for the Defendant. [17]

---

*In the District Court of the United States, for the District of Montana.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that heretofore, to wit, on the 28th day of October, 1915, there was presented and filed in this court an indictment against the defendant, which said indictment is in words and figures as follows, to wit:

**Indictment.**

United States of America,  
District of Montana,—ss.

In the District Court of the United States, within and for the District of Montana, of the September term of said District Court held at Butte, Silver Bow County, in said District of Montana, in the year of our Lord one thousand nine hundred and fifteen.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United [18] States, within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Joseph Pablo, late of the State and District of Montana, on the 6th day of September, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquor, commonly called whiskey, in quantity about one quart, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made

and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pablo, late of the State and District of Montana, on the 5th day of September, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquor, commonly called whiskey, in quantity [19] about three quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pablo, late of the State and District of Montana, on the 5th day of October, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous

and intoxicating liquor, commonly called whiskey, in quantity about four quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form [20] of the statute in such case made and provided, and against the peace and dignity of the United States of America.

B. K. WHEELER,

United States Attorney, District of Montana.

[Endorsed]: No. —. United States District Court, District of Montana. United States of America vs. Joseph Pablo. Indictment: A True Bill. W. F. Noyes, Foreman of Grand Jury. B. K. Wheeler, United States Attorney. District of Montana. Homer G. Murphy, Asst. U. S. Atty., Dist. of Mont. Witnesses: John Lamoose, Henry Matt, Harry Pritchett, Lucy Kirkpatrick, Napoleon Demontier, R. J. Holland, Harry Haines, Frank Kirkpatrick, Lawrence Pritchett, Phil Hull, Chas. Stevenson, Chas. Hunter, Andrew Gilbeau, J. W. Ramsey, Octave Couture. Presented by the grand jury in open court by their foreman, in their presence, and filed this 28th day of October, A. D. 1915. Geo. W. Sproule, Clerk. By —————, Deputy.

And thereafter, on the 16th day of March, 1916, the defendant appeared in person and with his counsel and was arraigned and answered that his true



name was Joseph Pablo, and entered a plea of not guilty.

And thereafter, on the 13th day of April, 1916, this cause came on regularly for trial in the above-entitled court, before the Hon. George M. Bourquin, Judge presiding, when the following proceedings were had, to wit: A jury was impaneled and sworn to [21] try said cause, and thereupon B. K. Wheeler, Esq., United States Attorney, and Homer G. Murphy, Esq., Assistant United States Attorney, appearing on behalf of the plaintiff, Albert Besancon, Esq., and John P. Swee, Esq., appearing on behalf of the defendant, and thereupon the following testimony was introduced and offered on behalf of the United States, the plaintiff, and on behalf of the defendant, as follows, to wit:

**Testimony of Charles Hunter, for Plaintiff.**

CHARLES HUNTER, being called as a witness, and being about to be sworn on behalf of the plaintiff, Mr. Besancon stated:

At this time we object to the witness being sworn to testify in this case upon the ground that he is incompetent to testify, having been convicted in this court of a felony, and judgment having been passed upon him in the month of February, 1914.

By Mr. MURPHY.—If the Court please, I have here a telegram, pardoning the witness, and restoring him to citizenship.

By the COURT.—Well, they seem to have met the situation, Mr. Besancon.

By Mr. BESANCON.—Of course we cannot question the telegram, but still we object to its being re-

(Testimony of Charles Hunter.)

ceived as evidence until the pardon itself is produced.\*

By the COURT.—The pardon is an act of the executive of the United States, and when it is brought into this court, it is entitled to judicial notice without any proof at all. Of course, when it [22] said the President has done a certain act, the Court must take notice of it. I think the telegram satisfies the Court, that it is so at this time. The objection will be overruled.

Exception taken by the defendant.

By the COURT.—As a matter of course, if there was any mistake, why, it would always be cause for setting aside a verdict, should there be one, or of any judgment; so no harm can be done in proceeding.

Thereupon CHARLES HUNTER was sworn as a witness on behalf of the Government, and testified as follows:

Direct Examination by Mr. MURPHY.

My name is Charles Hunter. I live in Washington at the present time. I am acquainted with the defendant Joseph Pablo and have known him for quite a good many years. I could not say just how long. In the fall of 1915 I was living at Arlee with Joe Pablo. I was in Missoula the first part of October of last year. I was working for Joe Pablo.

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\*It was stated by the District Attorney that the telegram was from the Department of Justice that the President had pardoned the witness, Hunter, and the Court read the telegram.—B.

(Testimony of Charles Hunter.)

I could not say just how long I did work for him—a month, anyway. It was along about the 25th of October when I was in Missoula. Somewhere along there. I couldn't recall the date exactly. I do not recall the time that Pablo was arrested; that is, I cannot remember the day, but I remember the fact that he was arrested. I was in Missoula a couple of days before he was arrested and left Missoula [23] about 11 o'clock in the morning with Joe Pablo, Philip Hull, Lawrence Pritchett, and Charlie Stevens. We left in an automobile. I came to town with Louis Pablo—no, it was not with Louis I came,—I forget now who I did come in with. I saw Joe Pablo in the morning before I left town with him. Saw him on the street. Lawrence Pritchett was with him then, and believe that Philip Hull was with him also. This was around on Higgins Avenue. Joe then said we would go out pretty quick. I don't remember that he said or did anything else just then. We did get something that day before we left town. We got whiskey. Seven dollars worth in all. There was two pints came from up here, the Frog Pond, they call it. This Frog Pond is over on West Front Street. When I got the whiskey at the Frog Pond Lawrence Prichett was with me. I paid two dollars for it. This was Joe Pablo's money. I got the money from Joe Pablo just a little while before I went there. Two dollars was the amount. I then got two pints and brought them to the car. The car was waiting for us there on Higgins Avenue. When I got to the car I put them in the hind seat. At that



(Testimony of Charles Hunter.)

time there was with me in the car Philip Hull, Joe Pablo, and Lawrence Pritchett. Charlie Stevens was not with us then. He got on here out of town. Just west of town. After that we went down around by the depot and up to the Montana Bar, where we got some whiskey, also three quarts and two pints of beer. I got this and paid five dollars for it. I got the money [24] from Joe—that he gave me by the corner at Schlossberg's. That was while we were at the machine, on the front step. At that time Lawrence Pritchett, myself, Louis Pablo and Charlie Stevens were present. The two pints that we got at the Montana Bar we put into the car in the hind seat, in the hind end; right in the car, inside of it and on the bottom of the car. At that time Joe was sitting in the front seat; Philip Hull was driving the car. Lawrence Pritchett was in the hind seat with me. We left town then. The car was going to Ronan on the Flathead Indian Reservation. When we started and as we were going along we were drinking a little. The car first stopped about three or four miles out of town. We had a bottle there. Phil Hull stopped the car. Somebody said to stop it. There was a bottle there. They said they had a bottle there and they stopped the car. We took the bottle. The car did not turn around or anything; it backed up. I could not say just how far it backed up. A bottle was obtained at that place. I don't remember who got it. It was put in the car. The contents of the bottle were whiskey. The kind of whiskey we bought in town that morning was Joel B. Fraser.



(Testimony of Charles Hunter.)

After we picked this bottle up on the road we went on. As we were driving along there was some drinking in the car. We were all drinking. We were all pretty near drunk. By all I mean myself, Lawrence Pritchett, Joe Pablo and Charlie Stevens. We were drinking whiskey from a pint bottle. I don't remember how many pints were drank. [25] We were drinking along the road there. These were the pint bottles that we got at the Frog Pond. I don't know how many times we drank out of the bottle—I couldn't say. More than once. As to the condition of the people in the car, Charlie Stevens was a little full. He was the only one that I know of. I was there. Charlie Stevens, Louis Pablo and Lawrence Pritchett were drinking. The car went out to Joe Pablo's place. Before that we went to Johnny Matt's place. There Charlie Stevens got out. At Johnny Matt's place there was some drinking. We all drank. By all, I mean Joe and Louis and Lawrence Pritchett and Charlie Stevens. I couldn't say whether Philip Hull was drinking that day or not. From there the car went to Octave Couture's. Stevens got out at Johnny Matt's place. We had a drink at Octave Couture's place—Octave Couture, Lawrence Pritchett, myself and Joe Pablo. After that we turned around and went back to Pritchett's place. Pritchett lives out of Arlee some place there. At Pritchett's Lawrence Pritchett got out there. The car then went to Joe Pablo's, about three miles the other side of Arlee. At Joe Pablo's place we stopped for dinner. I couldn't say what time we

(Testimony of Charles Hunter.)

got to Joe's place. We stayed there just about the time we ate dinner. I believe that I did have a drink there. When we got to Joe's place the bottles that were obtained at the Montana saloon or bar were in under the seat, the hind seat. I put them there. I put them there on the road four or five miles from Missoula. At Joe's place we took out [26] the bottles and then we got in the car and we put them back in again. I took them out of the car. When I got back in we had them up in front. I just took them out and then I put them back, in the front seat. When I got back in the car Joe Pablo, Phil Hull, myself, and Joe Pablo's wife and kids, were in the car. There were three children. I sat in the front seat with Philip Hull. Pablo sat in the hind seat with his wife. One of the children sat in the front seat and the other two in the back. From Pablo's the car went to Ronan. On the road between Joe's place and Ronan we met Louis Pablo. We met him on the other side of Ravalli. He was afoot. We picked him up. When we got to between Ronan and the Mission there was an automobile went up ahead of us and stopped, and a fellow got out there and held up his hand. Somebody says to keep going on; he says, "They are after us." Then we got out of the road a little and they tried to break the bottles. They told us to break the bottles. It was either Joe or Louis—it was from behind. I broke the bottles. Just took them in my hand and hit them together. After we got out of the road a little ways, out of the main road, we went toward a swamp

(Testimony of Charles Hunter.)

there. There was another road there. We turned off into this road. This side road went around a swamp. And then came back and turned around and went on. This road we took off to the side down the swamp was in the direction of Ronan. This was not toward the place we were going to. (Q.) How far on the traveled [27] road was that swamp, off of the main road? (A.) About two or three miles. I couldn't say who was giving directions to the car that we go down that road by the swamp. When this car came along it passed us in the same direction we were going in. They jumped out of the car; Andrew Gilbeau jumped out. He tried to stop us. He held up his hand and took out his gun and tried to shoot at the car. He started to shoot when we tried to get away. We were not then on the main road. We were just turning off when he started to shoot. I did not know who Gilbeau was at that time. There was no little wagon track where we turned off, not right there, but we got into one a few feet, about ten yards away; and between the main road and the wagon track which we got into about ten yards away the ground was just level—smooth ground. This was four or five miles toward the Mission from Ronan. Whiskey was in the bottles which I broke. They were bottles with whiskey in them.

Cross-examination by Mr. BESANCON.

I stayed at Arlee at this time. No, I am now in Washington. I lived at Arlee quite a while. I was up at Ronan for a while, too. While at Ronan or



(Testimony of Charles Hunter.)

at Arlee I was working for Joe Pablo. Not all the time—I was working for his brother Louis awhile. It is a fact that for a long time before this occurrence [28] that I have testified to that I worked for one of the Pablos, and that it was for the sister. I worked for Joe at the time I got hired from Joe Pablo's. I was hired from Joe Pablo's place. I don't remember if I had worked any before that, or not. In direct examination I said that in the fall of 1915 I lived in Arlee. I said I was at Arlee at the time. I was working for the sister up near Ronan before this. The two dollars that I said Joe gave me—it was down here by Smith's Frog Pond on Front Street. At that time Lawrence Pritchett, Joe Pablo, myself and Phil Hull were there. It was two silver dollars. From there I went to the Frog Pond with Lawrence Pritchett. Joe was not in front of the Frog Pond on West Front Street. When we came back we found him on Higgins Avenue, some place, I don't remember just where. We all got in the car down here by the corner at Schlossberg's. From there we went around by the Montana Bar; just drove down there, and somebody said stop. I don't remember who it was. I don't remember whether I said stop. We stopped, and Lawrence Pritchett and I went into the Montana Bar and we stayed there a little while. Phil Hull came along there looking up and down for me to come and go along with him. When we got out of the Montana Bar I don't remember whether Joe Pablo was still sitting in the car or not. We left him sitting in the



(Testimony of Charles Hunter.)

front seat when we got out. I don't remember whether he was there when we got back, but I think he was and facing forward. We came from the back end [29] of the car. I had whiskey. It was wrapped up in a little bundle—one bundle. I put it in the car. I guess Joe was looking at us. I know he was. He said to speed up, we would have to be going. I don't remember all that he said. Guess Phil Hull got in there when we did. That five dollars was given to me by Schlossberg's. I don't believe we were in the car just then. We were there at the corner—I and Lawrence Pritchett, Charley Stevens, Phil Hull and Joe Pablo. The whole party was there in front of Schlossberg's, and that is where he gave me the five dollars. I don't remember what time of the day that was. The car was right in front there. It was there right by the sidewalk, I don't remember just how it was now. I didn't ask Joe for this money. I don't remember of anybody asking him for it. Joe said we will have to take some out with us—some whiskey. He said whiskey and gave me this money. I am an Indian and have got land up on the reservation. I got whiskey in the saloons in town. I didn't get it at the Frog Pond. Tony Barnaby got it. I didn't say awhile ago that I went in and got it. I got this other man to go in there and get it for me. At the Montana Bar I said I went in and got it. No questions asked. I was not acquainted with the barkeeper or proprietor of the Montana Bar. I had bought liquor there before. I couldn't say how many times be-

(Testimony of Charles Hunter.)

fore. Not many times, but some time before. I said that on the way out some one picked up a bottle some two or three miles out of town here. [30] Somebody else picked it up. I don't remember who it was. I couldn't say it was Lawrence; but somebody got out and picked it up there. I don't know if I put it there myself or not. I might have, I couldn't say. I didn't tell this somebody else where to pick it up. The car stopped and he went and picked it up. That was a quart bottle of whiskey. It was hid along the fence on the right-of-way of the railroad. It had paper over it, I believe. I don't remember who told us to stop, but I remember the car stopped and somebody, I don't know who it was, went out and got this bottle of whiskey. I don't think Stevens was drunk when we left town. We picked him up right at the corner at Schlossberg's store. I didn't say that Phil Hull, the driver, drank anything on the way. I couldn't say if he drank or not anywhere on the road, but I could say that Joe Pablo drank on the road, along the road from town and down at Johnny Matt's place and all along the road between here and Arlee. They were not drinking all of the time. We stopped at Couture's place. I pulled out the bottle there and gave some to Mr. Couture. I did say that from four or five miles from Missoula I put all the bottles in the seat. That was when somebody got out to get the other bottle. I was sitting in the back seat and put the bottles in under the cushion and some in my pocket. I don't remember how much I had two pints

(Testimony of Charles Hunter.)

in my pocket. I couldn't say if anyone else had any in their pockets. They were in my pants' pocket. The rest of them were in [31] the machine. They were not wrapped up in my pocket. I put them under the seat. I put them under the seat. At Joe's place I took out those bottles and put them in the front seat. I had them right behind me, this way, I didn't take them and put them under the seat. They were not wrapped up when in the machine at this place. There was three or four quarts. They wasn't standing, they was laying down, four quarts laying down in the machine on the side where I was sitting and right behind me. I was not sitting on the bottles, they were around me. All of them were full. I *didn't* Gilbeau at that time. I didn't know who it was who stepped out there and started to shoot or said something; I didn't know it was Gilbeau. He said stop, I guess, I couldn't hear what he was saying. He threw up one hand and he didn't have a gun right away, he pulled out his gun afterwards. I couldn't say how many shots were fired. I broke the bottles, those four quarts. They were not from my pocket. There was one bottle from my pocket, a pint. I broke that also. I just took them and hit with my hands; took two at a time and hit them against each other.

Redirect Examination by Mr. MURPHY.

I don't know the man at the Montana bar that sold me the whiskey. I couldn't say now how he looked. He was the bartender, because he was behind the bar. We went a little [32] past the

(Testimony of Charles Hunter.)

Montana Bar when we stopped that morning—some forty or fifty feet.

Recross-examination by Mr. BESANCON.

Q. You have been convicted of introducing liquor on to the reservation?

By Mr. MURPHY.—I object to that as not proper recross-examination, and incompetent, and irrelevant and immaterial.

By the COURT.—Yes, it is, but I really think it ought to be allowed to be answered. Of course, this question with reference to whether a man has been convicted of a felony, that testimony is permitted in evidence so that the jury may take it into consideration, and weigh the credibility of the witness. My view is that it is better, because if it is a simple offense, why, the jury would take it into consideration in considering its credibility. If it was murder, or rape, it might have a much different effect upon the credibility of the witness. He may answer the question, whether he has been convicted of a felony, or not?

A. Yes, sir.

Redirect Examination by Mr. MURPHY.

Q. Did you plead guilty, or were you tried?

A. I plead guilty.

Witness excused. [33]



**Testimony of Charles Stevens, for Plaintiff.**

Whereupon CHARLES STEVENS, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MURPHY.

My name is Charles Stevens. I live at Arlee and have been living there about nine years. I know the defendant Joe Pablo. I am not a member of the Flathead tribe of Indians. I am a citizen of the United States; born in Canada. I was in Missoula in October, 1915, and saw Joe Pablo there. I left town with Joe Pablo, Phil Hull, Charlie Hunter, and the rest of the party. I think it was on the 5th of October the day we so left town. On that day I first saw Joe Pablo on the street, on Higgins Avenue. We were all together then, all those I have mentioned. I don't know the exact spot on Higgins Avenue; it was down on the street somewhere, on some corner. After we met him there we all got in the car and went on down the street, towards the depot, I think we went around there on Railroad street, the street we stopped at in town. I don't know exactly where we stopped; it was down after we passed the depot. I don't know where the Montana Bar is. I couldn't say whether there was a saloon where we stopped or not. When we stopped there Charlie Hunter and Pritchett got out of the car and went in back some place, I don't know, towards the back end of the car. They were not gone very long. When they came back they got in the car again. [34] Charlie Hunter had a parcel with him and took it in the car. Before we

(Testimony of Charles Stevens.)

met Pablo I had not been drinking. I don't drink and had not drank anything up to the time that I got out of the car at Railroad Avenue. When they got back into the car the package I think was put under the seat or in back of the seat in the back of the car. Then the car and we went on out; went out of Missoula. We stopped some place, I don't know; it was about four or five miles out of town. I guess Charlie spoke, I don't know, and the car stopped. I don't think there was anybody said to stop it. Then some of them got out of the car; I don't know who it was. I think it was Pritchett that got out of the car. He went,—I think he went back a ways, or went to one side of the road. The car was stopped when Pritchett got out. I don't know whether it was turned around, or backed up. I think it backed up. The person that got out of the car, I don't know what he did. He went to the side of the car and got something and brought it back with him. I didn't see what it was. I don't remember what it looked like. I don't know whether it was wrapped up I couldn't say that. After we left Missoula and along the road and after we got out from town we took some drinks. I guess it was whiskey. It was in a pint bottle. I don't remember how many drinks we took. I took four or five drinks anyhow, and all the other boys did. When I say all of the other boys, I mean, well, Joe Pablo, I think, and Pritchett and Hunter. I don't think Mr. Hull drank. [35] I don't think he drank any; I didn't see him. All the others that I have mentioned drank at the

(Testimony of Charles Stevens.)

time. I got out of the car at Johnny Matt's place; up on the hill there. As to my condition when I got out of the car at Johnny Matt's place, I was feeling pretty good. I was under the influence of whiskey, We were not all drinking all the way from Missoula to Johnny Matt's place. We were quite a way out of town before we drank. Along the road we had a few drinks. I stayed at Johnny Matt's place. We had four or five drinks I suppose in that time all along the road. I don't know whether there were any drinks taken at Johnny Matt's place; I don't think there was. Then I went up to Johnny Matt's house. I didn't go in there with the automobile. As to the package that was put in the car at that time, I think it was put in the back seat where we were sitting. I don't remember whether it was on top of the seat or under. I think it was under, some place in there.

Cross-examination by Mr. BESANCON.

At the place we stopped beyond the depot I stayed in the car all the time. Joe was sitting in front. I saw him there all the time. I don't remember whether Phil got out or not. I cannot just remember how many drinks we had on the way out. As I said, four or five times, I think. I do know where the bottle came from that was passed around—I think it was from Hunter. I think it was all the time from Hunter. I think he was the one that had it. [36] I could not say that I saw Joe Pablo with the liquor on that trip out. I didn't see him. Hunter took this from his pocket.



(Testimony of Charles Stevens.)

Redirect Examination by Mr. Murphy.

I saw Joe Pablo taking drinks out of the bottle—the same bottle that I drank out of. I don't know whether there were any drinks taken between Evaro and Johnny Matt's place. I don't know, that isn't very far from where I got out, about five miles, I think.

Witness excused.

**Testimony of Lawrence Pritchett, for Plaintiff.**

Whereupon LAWRENCE PRITCHETT, called and sworn as a witness on behalf of the Government, testified as follows:

Direct Examination by Mr. MURPHY.

My name is Lawrence Pritchett. I live at Arlee and know the defendant Joe Pablo. Have known him about three years. The first part of September, 1915, I was here in Missoula. Saw Joe Pablo here at that time. Left town on the 4th or 6th, I think—of October, I think. I left town with Joe Pablo, Charlie Hunter, Charles Stevens and Phil Hull. I first saw Joe Pablo that day walking around the streets. Phil Hull was with him and Charlie Hunter. I didn't talk with Joe Pablo just then. I met him several times on the street and we just talked. I saw Pablo give Charlie Hunter some money that day. I saw him give him [37] five dollars down here on the street. It was in front of the Montana saloon, I think. Pablo told Hunter to go buy whiskey with it. After that we walked in the saloon there and got the whiskey. I and Charlie went in the saloon and Charlie bought the whiskey there. He bought three quarts, and two



(Testimony of Lawrence Pritchett.)

pints, I think. I saw the whiskey after that. I saw it all the way until we got to Arlee. We left town about eleven o'clock. Charlie Hunter, Charles Stevens, Joe Pablo and Phil Hull were in the car at that time. After we left Missoula, I remember the car stopped about three miles the other side of Missoula. I don't know who ordered the car to stop. When the car stopped someone, I don't know who it was, got off. I did not get off. Whoever got off went to the fence, the corner, and got it and it was put in the car, there in the back seat. When Hunter got the whiskey at the Montana saloon he wrapped it up. It was put in the back end, at the back end of the back seat. It was laying right in the bottom, in the back. When we picked up the quart bottle along the road it had a paper around it and we took the paper off and put it under the back seat. Joe Pablo was sitting in the car, I think, when that was done. There were some drinks taken in that car as we went along the road. It was whiskey, and I drank some. They was all drinking. By that I mean Charles Stevens, Charlie Hunter, Philip Hull, and Joe Pablo. I don't know just which one passed the bottle. It [38] was a pint bottle. At different places along the road we took drinks. We took drinks after we passed Evaro. The first stop after passing Evaro was about six miles the other side of Evaro, at Johnny Matt's place. Charles Stevens then got out. He was feeling pretty good. The others in the car were feeling about the same. We had some drinks at that place, the bunch of them that was in the car. From there

(Testimony of Lawrence Pritchett.)

the car went to Octave Couture's place. We had another drink there. Couture's place is about a mile from Arlee, on this side of Arlee. We all took drinks there. We stayed there about twenty minutes, I guess. Couture's place is back from the road. From there the car came back to my father's place. This is about six miles this way from Mr. Couture's place. Not between Arlee and Couture's place, but this side of Arlee. I got out of the car then. I was not with the party again that day, or the next day. I was at Arlee during the month of September. I don't think I was away from Arlee around the first part of September. I saw Joe Pablo at Arlee around the 5th or 6th of September. This was in the year 1915, and all the transactions that I spoke about were in 1915. Arlee, Montana, is on the Flathead Indian Reservation. On September 5th and 6th I was down at Arlee. At that time they had a hand game down on the river, about a mile from the town of Arlee. There were about a hundred persons present, white people and Indians. I was there and went down there with Joe [39] Pablo. I just went down once I think—twice. He told me to get in the car and we would go to the hand game, and we did. This was on the 5th of February, I think,—the 5th of September or October, it was. I met him at the Chinese restaurant. Pablo told me he would take me to the hand game and we went. When we got down there we had drinks there. There were several, Henry Matt and myself. We got the drinks from Joe and drank them down there at the hand game. After-

(Testimony of Lawrence Pritchett.)

wards we came back to the Chinese restaurant; that is, myself, Henry Matt, Joe Pablo, and the Chinaman. We were traveling in Joe Pablo's automobile. When we went to the Chinaman Joe told him to give him a bottle of whiskey. I don't know if we had any more whiskey there then. The Chinaman got a quart bottle and gave it to him. I saw Joe Pablo the next day and was around with him. There was some drinking the next day around Arlee. I was with Henry Matt, Joe Pablo and Frank Kirkpatrick. We were drinking over at Blue-eyed Mary's. Her place is across the creek from Arlee, about a quarter of a mile, I guess. I don't know who had the liquor there. We were in the car when we left Arlee to go over there. In the car were Frank Kirkpatrick, Henry Matt, myself, and Joe Pablo. There was a quart bottle in the back seat of the car, I think. Joe was running the car. I didn't see anybody put the liquor in the car. There were no drinks taken along the road.

Cross-examination by Mr. BESANCON. [40]

The day we left Missoula Joe gave Hunter five dollars. He was in front of the Montana saloon, if I remember right. I think it was down west from the Northern Pacific depot. It was a five-dollar bill. As to whether Joe gave Hunter a five-dollar bill in front of Schlossberg's store when I and the rest of them were present, I don't know just what it was. I remember he gave him money. I don't remember just exactly where it was. It was on the street there somewhere. I think it was just before Hunter and I



(Testimony of Lawrence Pritchett.)

went back toward the Montana Bar. That is my recollection of it. That is all that was bought at the Montana Bar as I remember it,—three quarts and two pints. I think it was at the time that somebody went to the corner of the fence or the railroad there to get something, that the bottles were put in the machine in the back seat. I think Charlie Hunter did that. I was sitting there with him at the time. I had to get out of the machine and so did Stevens I don't know who brought the other quart and put it in the same place. I don't know just who got out of the car and went and got it; I don't remember. There was just one went and it was not me. On the way out Joe passed one bottle around and Charlie passed one around. Joe passed a pint bottle. He took it out of his pocket. We went to Couture's to look for Louis Pablo, I think.

Witness excused. [41]

**Testimony of Henry Matt, for Plaintiff.**

Whereupon HENRY MATT, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MURPHY.

My name is Henry Matt. I live at Arlee, about a mile and three-quarters east from Arlee. I know Joe Pablo and have known him since he was a little boy. He is a brother-in-law of mine. Think I remember seeing Joe Pablo in Arlee last September; it was in the neighborhood of the 5th, the 5th or 6th of September, 1915. At that time I was down to the ground there, where they were playing hand game .



(Testimony of Henry Matt.)

that evening, and Sunday on the 5th. Joe Pablo and Pritchett were there, and I saw Joe going around there playing with those fellows. They were playing hard and Mr. Pritchett made the statement to me. Joe was not there. Lawrence Pritchett told me something, and from there we started over to the Chink's. The Chink's place, that is the restaurant at Arlee. We started in an automobile, four of us,—Lawrence Pritchett, Ole Dennon, Joe Pablo,—there was five of us. Mong is the Chinaman. We went up to the Chinese restaurant. We went there, because it seems that they had,—that Joe Pablo asked the Chinaman if he had a quart. The Chinaman and Joe went out and came back with a quart of whiskey, I think. This we drank outside of the automobile, outside of the car, close to the automobile. I drank some of it with the others. We drank it all there. I guess I was around [42] with Joe the night after that; I went to sleep in the car and was unconscious and didn't know any more. I know where Blue-eyed Mary's place is. I think I went over there with Lawrence Pritchett and I think, Frank Kirkpatrick and Joe. I didn't see any liquor in the car at that time, because I was out of my memory. We all had a drink of whiskey at Blue-eyed Mary's, somewhere up around the stacks. I cannot recall who had the whiskey around the stacks, we was all drinking. I was pretty full, and I was out of my memory, and it was passed around among all of use there. Kirkpatrick, myself, Joe, and Lawrence Pritchett were there.

(Testimony of Henry Matt.)

Cross-examination by Mr. BESANCON.

I think I went over to Sanders with them that day. I went to sleep in the car, I think, when we went over there. I couldn't remember much about it. I was not in a condition to remember very well. When I woke up I went over to Arlee, Montana, and that is all I know and all I can state definitely.

Witness excused.

**Testimony of R. J. Holland, for Plaintiff.**

Whereupon R. J. Holland, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER.

My name is R. J. Holland. I am acquainted with Joe Pablo, and have known him ten or twelve years. I remember when the hand [43] game was going on at Arlee, and saw Joe Pablo about that time. This was in front of the Haynes store. That day I went out with Pablo to the ranch of Charley Sanders. Mr. Haynes, Lawrence Pritchett, Henry Matt and Frank Kirkpatrick went out in the car at that time. After we started I saw a bottle of whiskey. Joe was driving the car, and some whiskey was drank in the car. I cannot say just who drank it. I don't remember whether Joe drank or not. I don't remember the exact date, but would imagine that it was some time in September, during the time that the hand game was going on there. I couldn't state the exact date. Joe was driving the car that day, and I would say that he had been drinking. The first time I saw the bottle it was passed from

(Testimony of R. J. Holland.)

the back seat to the front seat. I was sitting on a small seat in the back of the car. It was a quart bottle. I didn't notice the brand.

Cross-examination by Mr. BESANCON.

I think Haynes was sitting with Joe in the front seat, and I sat in a little small seat, with my arms resting on the front seat. In the big seat behind were Henry Matt, Frank Kirkpatrick, and Lawrence Pritchett. The bottle was passed from behind. I only saw it passed once.

Witness excused.

**Testimony of Frank Kirkpatrick, for Plaintiff.**

Whereupon FRANK KIRKPATRICK was called and sworn as a witness on behalf of the plaintiff, and testified as follows: [44]

Direct Examination by Mr. WHEELER.

My name is Frank Kirkpatrick. I live at Arlee, and have known the defendant three or four years. I remember when the hand game was going on in Arlee. I saw Joe then. Took a ride with him over to Sanders' place. Joe drove the car. Just before we went over there we had come over from the Chinaman's restaurant. We had our breakfast at the Chinaman's, Henry Matt, Lawrence Pritchett, Joe Pablo and I. When we came back there was a quart bottle of whiskey in the car. I didn't see who put it in there. On the way out I drank some of it. I don't know whether Joe took a drink or not, I don't remember. I don't remember the brand of whiskey.

(Testimony of Frank Kirkpatrick.)

Cross-examination by Mr. BESANCON.

I was sitting in the back seat of the car with Lawrence Pritchett and Henry Matt. I don't know who started to pass the bottle, I couldn't say. It started from the back seat. That is my recollection of it.

Witness excused.

**Testimony of Lucy Kirkpatrick, for Plaintiff.**

Whereupon LUCY KIRKPATRICK, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER. [45]

My name is Lucy Kirkpatrick, wife of Frank Kirkpatrick. I am acquainted with Joe Pablo and know where Blue-eyed Mary lives. She lives across the creek from Arlee. I was at Blue-eyed Mary's place some time last September, talking with her. We moved there about the last of August. My husband stayed there too. I remember the time my husband came into Missoula. He came in with Joe Pablo, his wife, and I, the four of us. I don't remember what day of the week it was. When we got back from Missoula the next day I was at Blue-eyed Mary's and I saw Mrs. Joe Pablo there, she came there with me, and then there was my husband. He came back about 12 o'clock that night. The next day I saw Frank at the haystack, and there was three parties there with my husband. I saw them all around there at the haystacks, saw them drinking. I went around the stack afterwards, as soon as they went away, and picked up a pint bottle that was laying there. That was the day after we came back from



(Testimony of Lucy Kirkpatrick.)

Missoula with Joe and Mrs. Pablo. My husband didn't come back with us that day.

Cross-examination by Mr. BESANCON.

At Blue-eyed Mary's they were all around the haystack. That is not far from Arlee,—right across the creek, very close to the road and to the Sanders' house. I stood in the window and looked out. I was too far away and couldn't see the parties very well, but Lawrence Pritchett was close to where I [46] could see him. He took a bottle and passed it around. I didn't see where he got the bottle. I found the empty bottle there after the parties left.

Witness excused.

**Testimony of Andrew Gilbeau, for Plaintiff.**

Whereupon ANDREW GILBEAU, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER.

My name is Andrew Gilbeau and am a member of the Indian police of the Indian Flathead Reservation. I have known Joe four or five years, something like that. I live at St. Ignatius. Joe Pablo lives at Ronan, lives some two or three miles from Ronan, northeast from there. I saw Joe about the 5th of October. Saw him at the Mission, as he went through in an automobile which Phil Hull was driving, and in which were Joe and Louis Pablo, Phil Hull and Charlie Hunter as far as I know. There were some women in there, but I didn't know who they were at that time. After I saw them go through

(Testimony of Andrew Gilbeau.)

the Mission I got in the machine and went after them. I had received orders to stop the car, and I followed it on toward Ronan. I caught up with them somewhere this side of Ronan, not far from Ronan, this side, and I passed them, and as I passed them I tried to stop their car, that is, I started to get off of the machine, I stood on the side and looked at them, and hollered at them to stop, and I jumped off [47] and tried to block them, and they kept on going, and Hull went over the other way and took the way off of the road, and they went around there, toward the timber, and when they got up there above aways they came back down to the main road again. I fired three shots there. Before I fired the shots I flashed by badge and tried to stop them, and I hollered to stop three or four times. They just wheeled around and started right off away from me. They went off on another road. There is a wood road there, and I—it is an old road, and I don't know what they call it. Just where they turned off there was no road. After they left this road they went into another road, and after that from the main road, up toward Ronan. Then they came back into the main road. I went after them, up towards Ronan. I came back with Mr. Ramsey. When I was going that road I saw them drinking out of bottles. When we came back we got a number of bottles there. This was after we came back. Liquor, that is, whiskey, had been in the bottles. I could tell by smelling of the bottles. These we picked up right alongside of the track, right where I seen that

(Testimony of Andrew Gilbeau.)

they were breaking the bottles. It was a pint bottle and a big bottle. I picked up parts of them and could tell there was labels on them. I picked up one bottle.

By Mr. BESANCON.—We object to the witness testifying to the labels on the bottle. I think the witness said that it looked like these pieces. The witness is not able to identify the bottle that he [48] said he picked up.

By the COURT.—He can testify with reference to them, and you can cross-examine with reference to it. They are not bound to produce them. The objection is overruled.

(Exception noted by the defendant.)

As to the kind of bottle, it was one of those pint bottles; it was a big bottle, a flask, and it had a label on. The label had never been broken off the bottle. I didn't notice what make it was. I know it was a whiskey bottle and that whiskey was written on the label.

Cross-examination by Mr. BESANCON.

I lived at St. Ignatius. I didn't speak to anyone in the party when they went by. I didn't have any chance to as they went right on by. At that time I was standing off the porch at Beckwith's store, and I didn't notice them until they past by. They spurted past and I couldn't stop them then, they were gone too far by. The side curtains were up. It was raining. I am sure I know who was in the car. I didn't know all of them that was in the car, but I knew it was Pablo's car. I could tell that they was

(Testimony of Andrew Gilbeau.)

coming out. I had a telephone that they were coming out. Mr. Yaeck, or whatever his name is, and P. G. Carlson went out with me. I am not sure if I could have caught them if they had not slowed up for some purpose. They slowed up behind a wagon and then I [49] passed them. I was then riding in the back seat. I just opened the door as they went past, stepped on the running-board, and just as I went by them I got up and stepped out and held up my hand and showed my badge, held up my hand to stop, and just as I stopped, they went over the bank. I said we went over the bank, but there is a bank each side of the road. I then shot at the car, after they went by. I tried to stop them and I fired by them at the hind wheels. I have been in the Indian service about five years, most of the time. I lay off a month or so at a time. I have not laid off very much of that time, not over two months at a time, or two or three months. After the car turned away at the place where I did the shooting I didn't follow them right then. They went on the road toward Ronan and then came back to the road, and we followed them up. I saw the Pablos throw something out of the car. I seen them when they were reaching out breaking the bottles. When we came up I stopped and picked up the pieces. We came back three or four days after, something like that, and picked up the pieces out of the bottles.

Witness excused.



**Testimony of R. E. Haynes, for Plaintiff.**

Whereupon R. E. HAYNES, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER.

My name is R. E. Haynes and I am a merchant at Arlee. [50] I am acquainted with Joe Pablo. I have a ranch some place there. I remember going over to this ranch, the Charley Sanders' ranch. This was some time last September. In the car were Mr. Holland, Frank Kirkpatrick, Henry Matt, Joe Pablo, and Lawrence Pritchett. Before we got to Sanders', I don't remember just where it was, I saw some whiskey in the car. I don't remember whether it was a quart, or a pint bottle. The bottle was passed around, I couldn't testify whether anybody drank or not.

Cross-examination by Mr. BESANCON.

I was going out on a business trip with Joe Pablo and sat in the front seat with him. We were going to look at some hay that I had. A bottle was passed to me from the rear. It must have been passed from the rear. I took the bottle and nobody wanted a drink, so I handed it back over my shoulder this way.

Witness excused.

**Testimony of J. W. Ramsey, for Plaintiff.**

Whereupon J. W. RAMSEY, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER.

My name is J. W. Ramsey. I am a special officer

(Testimony of J. W. Ramsey.)

for the suppression of the liquor traffic among the Indians. I know where Charley and Octave Couture live, also where Johnny Matt lives, and [51] know where the Johnny Matt lane is. I am familiar with the interior boundaries of the Flathead Reservation on all of the roads. Johnny Matt's place, the Johnny Matt lane, Octave Couture's place, the place where the hand game was played last September, the home of Lawrence Pritchett's father, the Chinese restaurant, known as the Mong's place at Arlee, and which is the only Chinese restaurant there, are all within the exterior boundaries of the Flathead Indian Reservation.

I was at Ronan the 6th of last October, when Gilbeau came there, and I went back with him. I am familiar with the road between St. Ignatius Mission and Ronan. The entire distance of this road between those two places, also the town of Ronan, are within the exterior boundaries of the Flathead Indian Reservation. I don't know an Indian woman named Blue-eyed Mary. When I saw Gilbeau in Ronan on the 6th of October I got into an automobile with him and went south from Ronan. We went to the head of what is called the Nine Pipe Reservoir. From there we took up the road that runs east into the timber, sort of north and east, to the track of an automobile, and went around that road. I looked for some bottles, some broken bottles, and I picked up some bottles there at that time. I couldn't tell what had been in the bottles except from the paper and the labels. I know the labels that were on the

(Testimony of J. W. Ramsey.)

bottles. The main paper label was Joel B. Fraser Whiskey, and over the stop, the pieces that I had that went over the [52] stopper that had been in the bottle was a Government stamp on it, which said a hundred proof, one-fifth gallon.

Cross-examination by Mr. BESANCON.

It stated one hundred proof, one-fifth gallon. Had a couple of stamps on, and marked Joel B. Fraser. Witness excused.

**Testimony of Lawrence Pritchett, for Plaintiff  
(Recalled).**

Whereupon LAWRENCE PRITCHETT was recalled as a witness on behalf of the plaintiff, and testified as follows:

Direct Examination by Mr. WHEELER.

I testified here a moment ago. I remember going over to the Sanders' ranch, and on the way over there was some whiskey drank. I don't know where it came from. It was in the car there at the Chinaman's when we got in. It was a quart bottle and was lying in the back end, in the back seat.

Witness excused.

Government rests.

**DEFENDANT'S CASE.**

**Testimony of Joe Pablo, on His Own Behalf.**

Whereupon JOE PABLO, called and sworn on his own behalf, testified as follows:

Direct Examination by Mr. BESANCON. [53]

I am the defendant and my name is Joseph Pablo. I am an Indian and live at Arlee. I have lived there

(Testimony of Joe Pablo.)

about a year, on some land that I bought. I have some allotted land on the Reservation near Ronan. I am married and have four very young children.

I was in Arlee about the 5th of September, I believe the 5th was Sunday, and I was there on that day. My wife was with me in the machine. We went to Blue-eyed Mary's place together. The way I happened to go there, I met Lawrence Pritchett and he asked me if I wanted a drink, and I said, "If you have any I will take a drink. He then said to come over, that he had a cache over there at the creek. Then Henry Madden, Lawrence Pritchett, my wife and I drove over there. We couldn't cross the creek with the machine and we got off and crossed the foot bridge. From there we went over to the stack. Then Lawrence Pritchett went down in the brush and got a bottle. He didn't go very far, just a little ways, and brought back the bottle. Lawrence passed it to me and I took a drink and the rest all drank. Lawrence put the bottle back in his pocket, and we got around there until we emptied the bottle. Then we talked for awhile and then we got another bottle. That was a pint bottle and we emptied it and threw it away. Then, after that, we opened it and drank it, I don't know what he did with it. He produced three bottles in all. From there we went up to the hand game. From Kirkpatrick's we went back across the creek and got in the car and drove back to the river. Then we went and looked at [54] the hand game. I was not in the car while we were at the hand game, and I didn't see any



(Testimony of Joe Pablo.)

liquor there, but that day I did see some and this was after we got to the hand game. Lawrence Pritchett brought some over. He called us away down in the brush and went a little ways and got a bottle. This was a short distance away from the hand game. He passed some to me and to the others. When this was all gone I left, and went back to Arlee and came down with my wife and we came to Missoula that night and we went back again that same night. On the next day, the 6th, I was in Arlee, and went out and bought some hay that day. On the trip there was with me Henry Matt, Frank Kirkpatrick, Lawrence Pritchett, Mr. Holland, and Mr. Haynes. I wanted Holland to kind of help me out in regard to the hay and he went out to do this and for the ride. I was buying the hay from Mr. Haynes. The other three just went along for the ride. We started from the front of Mr. Haynes' store. I was sitting in the front seat with Mr. Haynes. I believe I saw some liquor or bottles on the trip. The bottle was passed and I refused it. I didn't take any. Mr. Haynes passed the bottle back to the back seat. I didn't drink at all. On that same day I came from my place to Arlee in the morning, I guess about noon, and Lawrence Pritchett asked me if I wanted a drink and I told him I would take a drink if he had it. He said he had a cache and he went to the stack and got a bottle there. On that day Henry Madden, Lawrence Pritchett and I left to go to Kirkpatrick's. [55] This was Blue-eyed Mary's place. Kirkpatrick was there. We then drank a pint. I don't

(Testimony of Joe Pablo.)

know what was done with the bottles. I never put that liquor down in the brush there. I never told anybody to put it there. I had not given anybody any money to buy liquor or put it there. I guess it was there before; I don't know anything about it. I know the Chinese Restaurant at Arlee. I had been there sometimes to get liquor. As to the witness testifying that I went down there and the Chinaman brought out a bottle, I don't remember anything at all about it.

Q. Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle? A. I believe I did, yes.

Q. Well, just tell us about that?

A. Well, I didn't see any whiskey there.

Q. What is that?

A. I didn't see anything there at all.

Q. You didn't see anything? A. No, sir.

Q. You didn't get any? A. No, sir.

Q. Well, did you see anybody get any at that time?  
[56]

By the COURT.—Did he answer you that he got a bottle of the Chinaman? Read the question to the witness.

Q. Did you, before going to the hand game, go down to the Chinaman and get a bottle before going to the hand game, did you see anybody get any whiskey at the Chinaman's?

(Testimony of Joe Pablo.)

A. No, sir. I was in Missoula on the 5th of October. The night before I kept my car at a place located next to Schlossberg's at the corner, Shoemaker's place. On that day I got out of town about 10 or 11 o'clock, I think it was.

At this point a recess was taken until 1:30 o'clock of the same day.

1:30 P. M., same day, trial resumed.

On the 5th day of October, on leaving Missoula, I got into the car in front of the Schlossberg's store. I didn't give Charlie Hunter any money to buy booze. We all got in at that point. Charlie Hunter asked me if I would give him a ride as far as Ronan. I told him I would and they all asked me to take them right out to Ronan. Charlie Hunter had not been working for me at all and was not going to work for me that I remember of. From Schlossberg's store we went to the depot, that street going down to the depot. Lawrence Pritchett asked us to stop there and we stopped. I didn't get out of the car at all. Charlie Hunter got out. I didn't know where those two men were. We stayed there [57] quite a while, then they came out. Three of them came back. Nobody said anything about starting out again, we all got in and started. I didn't see them putting anything into the car nor hear them say anything about putting anything into the car. Nothing was said about liquor or whiskey at all. I never said anything and didn't hear them say anything on way going out. We stopped about four or five miles out of town. Lawrence Pritchett asked



(Testimony of Joe Pablo.)

us to stop. He got off. I didn't notice which way he was going, nor what he was going to do. I thought he was going to do something, but I didn't watch him. He went out to the fence and I didn't see him bring anything back. We all got in again. I didn't see anything going on in the back seat. I didn't see them taking out anything from the front of the seat and putting it in the machine. We drank something on the way out, before we stopped. Lawrence Pritchett pulled out a bottle and passed it around. When the second pint was brought out we were quite a distance out, we were about a half mile passed DesMet. Nothing was passed after that. I didn't see any liquor in the car after that and didn't know there was any liquor in the car. We went right on, on the main road, until we stopped at the Matt lane. The Matt lane is about nine or ten miles from where we would have crossed the Reservation line, maybe more, I couldn't tell exactly. The Matt lane is about four miles from Arlee. The Reservation line is right near Evaro. From the Matt lane we went [58] to Couture's place. Nothing happened at the Matt lane except that we stopped there and Charley Stevens got out. No liquor was passed around. We went over to Couture's place to see if Louis was there, and they said he was gone; so we turned around and came back again. We saw Couture and his wife. I didn't see any liquor there. From there we went down to my place. We made one stop, at Mr. Pritchett's place, where Lawrence got out. I didn't see any liquor passed around there. Then we



(Testimony of Joe Pablo.)

went on to my place. Pritchett's place is about four miles from my place. At my place we had dinner, and then started again. When we left my place my wife and the three children were with me, and Charlie Hunter and Phil Hull. I was riding in the hind seat with my wife and the children. Hunter was riding in the front seat with Phil Hull. I didn't see any liquor in the car at my place. Didn't see any bottles in the front seat. From there we went to Ronan. We caught up with my brother Louis at Ravalli. He got into the car. We had the curtain down and it was raining that day when we left my place; that is, the side curtains were on and the curtain on the back also. We didn't stop at St. Ignatius. We went right on through there. After passing St. Ignatius a car passed us, but I never noticed it. I didn't know anybody was in the car until there was some shooting. I didn't tell anybody to run away from them. I didn't say anything to the driver; didn't say a word. I heard four or five shots. In the car my wife was consoling the [59] kids, they were crying and I was helping her with the kids and I didn't notice anything. I didn't see a rig ahead of us, because there was two fellows ahead of me and I couldn't see. These men obstructed the view in the front, and there was a wind shield in front and it was dirty and I couldn't see through it very well.

The wind shield was up and the curtains were down on the car. It was raining, and it was pretty muddy. I didn't hear anybody yell and say to stop. The car then went west and went to Ronan, and then

(Testimony of Joe Pablo.)

went back to—We just took the road. Then we went to my brother Louis' place and stopped there over night. The next morning I went to my mother's place. From there—they were getting ready to thresh—and I had more business in Ronan and went there, and was arrested there, right in front of the State Bank, and brought into Missoula. On that trip from my place at Arlee, right on up to my place at Ronan and my brother's place, I didn't see any liquor in that car on that trip. None whatever; no bottles of any kind. Didn't see anybody breaking any bottles and throwing them out.

Cross-examination by Mr. WHEELER.

As to the charge against me on September 5th and 6th, I was at Kirkpatrick's and Mrs. Kirkpatrick and my wife came into Missoula with me on Sunday, the 5th. It was in the afternoon, towards evening. Kirkpatrick was not with me that day in Missoula, [60] and we were not drinking in Missoula together. He did not come in with me. Mrs. Kirkpatrick and my wife were here, but he was not with me. I didn't see him at all that day. I was not down here in the garage with Kirkpatrick and I didn't see him at all that day. We went back in the evening to Arlee, and I took the women folks over to Blue-eyed Mary's and left theme there and went to the hand game and then came back and went home. Was at the hand game an hour, I guess. I didn't see Harry Pritchett down there. I was not there on the night of the 6th and didn't see Harry Pritchett down there on that night. It is not a fact that Harry Pritchett

(Testimony of Joe Pablo.)

and I took part in the hand game there the 5th or 6th. I didn't call him to one side and give him a drink of whiskey out of a pint bottle, and I didn't give him a drink out of a quart bottle. I was down at the hand game on the 5th, and stayed there about an hour, or half an hour, I guess. I was with Henry Madden and Lawrence Pritchett, and we had something to drink that night, out of a pint. I didn't see any quart bottle. I didn't have any dinner at the Chinaman's place with Henry Matt and Lawrence Pritchett. I didn't eat there at all along about that time. I just went in there and stopped there a while and went on. I didn't get a bottle of whiskey at the Chinaman's. I had not obtained whiskey there before. I didn't say this morning that I got whiskey there at the other Chinaman's.

Q. Didn't Mr. Besancon ask you this morning if you had gotten liquor there at different times? [61]

By the COURT.—Well, he did put sort of a double question to the witness, and asked him if he was not at the Chinaman's and got booze, and answered, I believe I was, I believe I did. Now, whether he was answering the first part of the question and told him he got the booze, or whether he was at the Chinaman's would be for the jury.

I didn't get any whiskey at the Chinaman's at all. I saw no whiskey there and didn't have any drink at that place. On going over to the Sanders' place there was a bottle passed from behind, but I didn't see where they got it from and didn't know it was in my car.



(Testimony of Joe Pablo.)

I went over to Blue-eyed Mary's place. Lawrence Pritchett invited us over there. I didn't ask for Frank Kirkpatrick. I knew he was there. I went out by the haystack with Kirkpatrick and Matt and Lawrence Pritchett. I don't think Henry Matt was drunk at that time. It is true that there was a quart, and also a pint, bottle of whiskey there. Lawrence Pritchett had it.

I was convicted of introducing whiskey into the Reservation before. I was sentenced, but it wasn't my whiskey at all. I pleaded guilty to it here in this court, because it was a friend of mine, and I took the punishment for it. I came in here on October 5th and was brought in by Glenn and Gilbeau, brought into this court at that time.

I didn't engage Hunter to work for me and he didn't work [62] for me after that, and never worked for me at all. Just before he came into town he didn't work for me, he worked for my sister. My sister lives about half a mile this side of Mud Creek, about a half a mile away from me. I first saw the boys, Pritchett and Hunter in front of Schlossberg's. I didn't talk to them on the corner of the street, didn't talk with them at all. When I first saw them they was asking me if I wouldn't give them a ride, and I told them to get in the car. I had not seen them on the street prior to that time. If I did see them I don't remember it. They got into the car, and that was the time we were going home, and drove down in front of the Montana Bar. I didn't notice the bar, but drove down that way



(Testimony of Joe Pablo.)

and Lawrence Pritchett stopped us. I didn't see any saloon there and don't know where the Montana Bar is. There may be some saloons in town that I know, but I don't pay any attention to them. When we stopped Lawrence Pritchett and Hunter got out of the car. They were gone quite a while and then Hull went to see what they were doing. I didn't send Hull after them. I was anxious to get home to go to work. I don't know where Hull went I didn't pay any attention to him, didn't watch him. I saw them get into the car, but I didn't look at them. Didn't see them come out of the saloon, nor did I see them when they came up the street. I heard them get into the car, but I didn't look at them. I was looking ahead, and didn't do this because I thought they had whiskey. After we got out of town Lawrence [63] Pritchett passed a bottle around. When we got down a little farther they asked me to stop. I was still in the front seat, and I didn't look around to see where they went to. Lawrence Pritchett asked to stop. I didn't see him come back from the place and don't know where he went to; I was not watching him. I didn't see him have a bottle of whiskey in his hand.

I didn't see anyone have a drink at Octave Couture's place. We didn't have a drink at the Matt lane, nor at Pritchett's. We didn't have any drink at all, nor did I see anything on the reservation. I didn't see Joe Hunter break bottles and throw them out of the car at the time Gilbeau stopped us. I didn't see any bottles, nor did I see anybody throw

(Testimony of Joe Pablo.)

anything out. I know Harry Pritchett, Lawrence's brother; have seen him a few times. I don't know where they turned off the main road going to Ronan. There was some shooting and I didn't pay any attention to what was going on. The car might have stopped when they were shooting, I couldn't say. The children were screaming when the shooting took place. There were four or five shots. I didn't hear Gilbeau say stop. I know Andrew Gilbeau, but I never talked to him very much. Never was over at his place at the Mission. I have known him, but never talked to him. He might be married to some of my relatives, but I am not sure whether he is or not.

I stated that we had some bottles of whiskey at the hand game, but not after we left the hand game. The next day we did. [64] That was the next day over at Blue-eyed Mary's place. I don't know where this whiskey came from. Lawrence Pritchett said he had a cache and went and took it out himself and passed the bottle around. Blue-eyed Mary's place is about a half mile, I guess, maybe not quite, maybe a quarter, from Arlee, and about a mile and a half from where the hand game was going on and about a mile from where Lawrence Pritchett lives. It is not a fact that the whiskey that was drunk at Blue-eyed Mary's place came out of my car. I didn't drink at the Chinaman's place out of a quart bottle of whiskey that we got from the Chinaman. That night I left my wife and children at Blue-eyed Mary's place. They stayed there and I went to

(Testimony of Joe Pablo.)

the hand game a while, and then came back up there and went back home. I didn't leave my people at Blue-eyed Mary's place, but took them along. The first time I was at Blue-eyed Mary's place Lawrence Pritchett was there, the first time I took my wife and family there. He got in in front of Haynes' store and rode over with us. At the time I came to Missoula with Mrs. Kirkpatrick and my wife I went over to Blue-eyed Mary's place. Lawrence went over with us on the 5th, that afternoon, and in the evening I came to town. Lawrence Pritchett was over at Blue-eyed Mary's place; it was eleven or twelve o'clock. We didn't go over to the hand game at night; we went over in daytime. Lawrence was at Blue-eyed Mary's place in the daytime. It was before we came to Missoula and then he had some whiskey there and we had some [65] drinks. He was with us there, there were four of us. He was in front of Haynes' store and he walked,—and he asked us whether we wanted a drink. I told him, if you got a drink I will go over across the creek and get a drink. That was about eleven or twelve o'clock and before we came to Missoula. In the party were Henry Matt, Lawrence Pritchett, Frank Kirkpatrick and myself. When we got back from Missoula Lawrence Pritchett was not over there. The only time that Lawrence was over there was before we came to Missoula and before we went down to the hand game. It was on Sunday.

Redirect Examination by Mr. BESANCON.

I was at Blue-eyed Mary's place in the daytime.

(Testimony of Joe Pablo.)

It was after the hand game that I went there. That same evening I came to Missoula with Mrs. Kirkpatrick and my wife, around about two o'clock, I guess, the same day, and went back that evening. It was on Monday, the next day that I made the trip to the Sanders' place. I was asked a while ago by the district attorney about my sister's place and how close it was to my place, and I stated about half a mile; that is, from my place to Ronan. This place is my allotment near Ronan, and my sister's place is about a half a mile from there. During all the time stated in the counts of the indictment I lived at Arlee, and had been living there about a year. When talking about the place where Lawrence Pritchett lived, [66] I meant his father's place. Lawrence lived with his father at that time and just a little ways from the town of Arlee.

Recross-examination by Mr. WHEELER.

I remember when I was up in the car on the day I was arrested. It was the 6th of September, no, October. I don't remember having a conversation with Mr. Glenn after I went downstairs; I never talked to none of them. I don't remember having made any comment to Mr. Glenn about what the Court had told me. I didn't say that the reason that the Judge had told me what he did was because he knew I was up against it again.

Witness excused.



**Testimony of Mong, for Defendant.**

Whereupon MONG, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is Mong. I sometime live in Arlee and sometimes at my home in Dixon. Last September or October I lived I think up to Arlee. As to my running a place of business there, I got some, I had some men to put up some buildings. I knew Joe Pablo a few times, but ain't acquainted with him much. I knew him before the time you state. I am not running a restaurant there. I have no restaurant. I just stop there. I have no place there, and no business there. There was another Chinaman in business there. [67] He is John Ling and is not here now. As to seeing Joe Pablo about the 5th of September at Arlee, I couldn't say what day. I don't remember his going out to the Sanders' place, don't know anything his going to the Sanders' place. I remember the hand game and was there. I didn't then give Joe Pablo a bottle of whiskey. I *couldn't whether* he got any whiskey or not. I don't know of his getting any at the place that I mentioned. I didn't see him get any whiskey. I didn't see Joe in town at all, and didn't see him get any whiskey at all. There was no whiskey being sold or given away at this place that I have mentioned at that time; none whatever.

Cross-examination by Mr. WHEELER.

Asked if they had whiskey there at that place, will say that he didn't give me no whiskey and I didn't

(Testimony of Mong.)

give him any whiskey. I didn't see any whiskey there. It was night-time and I couldn't see whether he had any whiskey or not. He didn't tell me he had any whiskey. Joe didn't tell me he had any whiskey; he didn't tell me anything. I didn't see Henry Matt in the night-time. I saw him the next morning. I couldn't say whether he had whiskey or not, that day there. I guess that they ate there. As to whether Joe ate there, I couldn't say. They may have, but I couldn't say. As to Henry Matt eating there, I couldn't say who ate there. I ain't got no business there, just help the Chinaman there. I don't sell liquor there and never have any whiskey. As to saying [68] a little while ago that they ate there, well, it might be somebody else, I couldn't keep track of them. Somebody may have eat there; I couldn't keep track of them. I couldn't say whether Henry Matt was there or not. I might have seen him there, but didn't see him doing anything. As to whether he was sitting down at the table, I couldn't keep track of him. Joe may have had whiskey there and I not know it; I couldn't swear as to that. I don't know whether Henry Matt was drinking or not. At that time I seen him down there, but I don't know whether he was drinking or not. I didn't see him drinking, and he didn't try to throw anything at me.

Witness excused.

**Testimony of Philip Hull, for Defendant.**

Whereupon PHILIP HULL, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is Philip Hull. I live at Ronan, and have lived there since September and October of last year. I was in Missoula about the 5th of October, last fall, driving an automobile. It was Joe Pablo's machine. I left the machine some place in town, at Shoemaker's garage, and started out from there. It was half-past ten or eleven in the morning. From there I went to in front of Schlossberg's store. Joe was with me when I left Schoemaker's. At Schlossberg's I met Hunter, Pritchett, and Charley Stevens, [69] I believe. This was in front of Schlossberg's store, and they were talking to us while we were there. They got in then. I didn't see Joe Pablo hand any money to anybody. From there we went down on the Railroad Avenue. Some one in the car told me to stop there. I don't know who it was. It was not Joe; somebody in behind. I stopped, and then Lawrence Pritchett and Charley Hunter got out of the car and went up the street. They were gone quite a little while and I went and got them. Found them in the saloon. I don't know the name of it. They were drinking at the bar. I told them to come along, that we had to go on. I walked on back ahead of them to the car. Joe was in the front seat where I had left him when

(Testimony of Philip Hull.)

I came away. The other men got in. I saw them put in a package. They brought a package out from the bar at the saloon. I don't know whether they put it in the car or not; I didn't see them. They got in with it, but I don't know whether they put it in the car. It was wrapped up. We then started out, and stopped out from Missoula about four miles, near the brickyard. Someone suggested to stop. I don't know who it was; I was going along and they wanted me to stop. Lawrence Pritchett jumped out and got a bottle that they had left there the day before. I saw the bottle the day before. I didn't see them take it there this day. I couldn't swear that he was the one that requested me to stop. Somebody in behind wanted me to stop. I didn't see them put anything into the car then. We went on. I couldn't say whether [70] there was any drinking in the car on the way out. I don't know; I wasn't drinking, and I didn't see them. I wouldn't drink myself, and there were no bottles being passed around. We went on to the Johnny Matt place. We didn't exactly stop there, but we slowed up the car, and Charlie Stevens got out. There was no liquor passed around at Matt's place. The next stop was at Couture's place. Mr. Couture was there, I think, and I saw Mrs. Couture about the house. There was some liquor at that place I don't know who had it and I don't know who did take it. Joe didn't take any, and I didn't see him with it. I didn't see any of them drink any of it. I was talking to Octave Couture. From there we went to



(Testimony of Philip Hull.)

Joe's home. On the way out we stopped at Holland's to let him out. There was no liquor passed around there. I don't know whether he took anything out with him or not. I didn't notice whether he took anything. We didn't stop the car, we slowed up and he stepped out. We had dinner at Joe's place, and I didn't see any liquor there. The party then went straight through from Joe's. Charley Hunter was in the front seat, with me, and one of Joe's boys. Joe and his wife and the two other children were in behind. I didn't see any liquor on the front seat when I got in. Had there been four quarts on the seat next to me in front in that car, I should say I would have seen them if there had been any there, unless there had been a blanket covered over them, I would see them. I didn't see any bottle there at all. On the road we [71], caught up with Louis, Joe's brother, at Ravalli. We went right on and didn't stop at the Mission. Beyond the Mission a car overtook us and got ahead of us and one of the men got out and pulled a gun out and started shooting. I didn't know the man and he didn't say anything that I could hear. I didn't notice him waiving his hands. He started to shoot. I turned out of the road and left the road, not for very long; took another road out and kept going. As to whether anybody in the car at that spot, right there when the man came out and started to shoot tell me to hurry on and get away from there, I will say no, not until after we got out of the road, then somebody said, there was an officer. I couldn't

(Testimony of Philip Hull.)

say who said that; I couldn't say that it was Hunter, and I don't know who said it. As to the words that were used, I couldn't say just what they were. I didn't stop. From there we went to Louis' home on Mud Creek. After passing the man that fired the shots I didn't see any bottles broke. I didn't see Hunter take two bottles and smash them together and throw them out. Didn't see anyone throw out any bottles. There was no mention of bottles of liquor. We went on home to Louis Pablo's place. I didn't see any liquor at all in the car, nor did I see any liquor in the car at all at any place from the time we left Couture's, none of any kind.

While in front of the Montana Bar, when Pritchett and Hunter got out to go back, I didn't see Joe Pablo give them any money. I was sitting with Joe at the time. There was nothing said [72] about money to buy booze; not a word. I was with Joe all that morning in Missoula. Was with him all the time from the time we reached Missoula to the time we went out. We got in the night before, and I slept with him. I didn't see him give Hunter two dollars to go to the Frog Pond to get some booze. I didn't see Hunter with Joe that morning with the party that came up in the car, not that I remember of.

Cross-examination by Mr. WHEELER.

I didn't know at the time I turned off the main road and started across the field that there was liquor in the car at that time, and I didn't testify in this court on the witness-stand that I knew there

(Testimony of Philip Hull.)

was liquor in the car. Someone told me, after I had turned off that road, that it was an officer, but no one said that they were after us. Hunter was sitting on the front seat and the little boy was sitting between us. I didn't see Hunter or anyone else reach out of that car and break bottles. A car doesn't make much noise, but the curtains were down. If that had been done I don't know whether I would have seen it, or not. The reason I turned off that road and started away out of the road was because I thought we were being held up. As to the time of the day, it was about four or five o'clock, about four o'clock, I guess. It was not about two o'clock in the afternoon. At that time we had come from [73] Joe's place and were going to Louis' place on Mud Creek. From the point where we turned off of the main road, if we had followed the main road over to Louis' place it would have taken us about an hour or an hour and a quarter. From such point to Louis' place was about twelve miles, I should think. I don't know how far it is around the other way. We didn't ride in the field, but right on the prairie, and then we ran into this old road through the grass. I saw this man step out in front and holler. I couldn't say I was looking at him at the time. If anybody jumped out in front of the car I saw him. I don't know whether he held up one hand or both hands, or not. I should say there was a team right back of us, about two or three hundred yards. We had passed them just a little before they passed us. I didn't know this was Gil-

(Testimony of Philip Hull.)

beau. I had never seen him before. I have lived on the Reservation practically all of my life, except when I went to school. I went to school there. I have not lived around the Mission since he has been there, although have been around the Mission quite a little during the last four or five years, and I mean I have never seen Gilbeau around the Mission at all. Don't know how big the Mission is. There are two or three hundred people living there.

As to the bottle of whiskey that we stopped to pick up on the way back, I think Carl Thomas had cached it there the day before.

Q. Who was with you when that was cached the day before that? [74]

By Mr. BESANCON.—I object to that as not proper examination.

By the COURT.—Objection overruled.

(Exception taken by the defendant.)

A. Charley Hunter, Lawrence Pritchett, Joe Pablo, and Carl Thomas.

Q. Joe Pablo? A. Yes, sir.

Q. Charley Hunter? A. Yes, sir.

Q. That is the boys that got off of the other car?

A. Yes, sir.

Q. They are the boys that got off of Louis' car?

A. I don't know whether they got off of Louis' car, or not. Charley Hunter brought it there. That day Joe Pablo was riding with me in the front seat. Carl Thomas was in the rear seat. I don't know where they put the booze. I knew it was there along the fence. I knew they had it there,



(Testimony of Philip Hull.)

because they got out. He told me what he was going to do but not Joe and me. Joe and I were riding in the front seat, but he didn't tell anybody, he just stepped out, and left it there. He might have told me he was going to leave it there. As to whether that bottle of booze was drank right up there, I don't know whether it was, or not; I didn't see it afterward. It is not a fact that Joe Pablo was with Lawrence Pritchett, Charley Stevens and Charley Hunter before they ever got into the car at all. Not that morning. [75] They were not standing, talking on the corner, with Charley Stevens, Hunter and Pritchett, altogether. Joe and I were in the car all the time. After I got in I didn't get out of the car. It was about half-past ten when I got into the car, and got out about eleven. Joe was not with Stevens, Hunter and Pritchett on the corner. Joe and I didn't meet Hunter, Pritchett and Stevens down there at all, at least not that I remember of. When we were going out on the car I didn't know that they stopped and drank whiskey as they went along. I don't know whether Joe had a bottle, I was driving and I didn't pay no attention to it.

Q. Didn't you state to Mr. Murphy in the United States Attorney's office that you knew that they were drinking, and passing bottles around in the car?

A. I don't believe they were drinking, I said that they were full, and Mr. Murphy will remember that.

Q. Didn't you say that they were drinking when

(Testimony of Philip Hull.)

you were driving that car along there, yesterday, down in the office.

A. I don't think I did, no, sir.

Redirect Examination by Mr. BESANCON.

I was subpoenaed here as a witness for the prosecution, and the attorneys for the Government examined me carefully yesterday, and they didn't call me this morning.

Recross-examination [76] by Mr. WHEELER.

I was also subpoenaed by the defendant. I was working for Joe at the time. I drove his car to town for him.

Witness excused.

**Testimony of R. H. Yaeck, for Defendant.**

Whereupon R. H. YAECK, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is R. H. Yaeck. I live at Dixon, and was living there about the 5th of last October. I drove out Gilbeau on a trip that day. I don't recall the exact date, but I did take him out. P. C. Thompson was with us coming out, and going back Mr. Ramsey was with us. We went out from the Mission on towards Ronan. There was a car ahead of us, and we passed a car about five miles this side of Ronan. As we passed, Mr. Gilbeau stepped out on the running board of my car and tried to stop the car ahead. They were just passing and they wouldn't stop and kept on going towards the side

(Testimony of R. H. Yaeck.)

and climbed the embankment, and kept on towards the timber. At that time Mr. Gilbeau pulled out a pistol and started shooting. I have no recollection that Bilbeau yelled to them to stop. I think he did say something, or asked them to stop. I don't recall how many shots were fired, but I think three. I think Mr. Gilbeau made some motion to them to stop when he fired the shots, and I think he spoke about having one shot left. From there we went to [77] Ronan. We didn't follow the other car at that time, but we came back afterwards and we followed what we thought was the trail of that car. I didn't watch this car as it was going off in the distance, not very long; we might have stood there a minute or so. I didn't see any bottles being broken or thrown out from the other car. We went to Ronan, and coming back Mr. Ramsey got in with us at the first bridge this side of Ronan. I think we came back to the point where we passed the other car; I believe it was the same place. From there we followed the trail of what we imagined was the trail. I am not sure that was the trail they took. The country was new to me. I hadn't been there very many times before; I followed directions more than my own information. Gilbeau stated that was the trail and that we would follow it. I don't have any vivid recollection as to what happened on the way, but I think we stopped and examined some broken bottles. I didn't examine them, but think I did see some pieces of broken bottles, don't recollect how many.

(Testimony of R. H. Yaeck.)

Cross-examination by Mr. WHEELER.

Gilbeau got out and stood on the running-board of my car; jumped off and ran along and turned off the road. I think he ran along the side of the car and started to chase their car. I was all the time sitting in my car, driving, and I didn't get out. If he held up his hand at all I think it was while standing [78] on the running-board of my car, as it appears to me now. I haven't any positive recollection about that. When we got back to that place coming back, I didn't get out. Ramsey and Gilbeau did get out. I don't recollect that both got out, but I think Mr. Ramsey did, maybe they did. I couldn't be positive that both got out and looked for broken bottles.

Witness excused.

**Testimony of P. C. Thompson, for Defendant.**

Whereupon P. C. THOMPSON, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is P. C. Thompson. Have lived in St. Ignatius for about nine years. I was out with Mr. Yaeck last October, but don't remember the date. Mr. Gilbeau was along in Mr. Yaeck's car. When we got out about, I should judge about a mile from where we stopped where that car went past, we passed them. First we passed a wagon, or something, and when we got out there about where our car was coming up to them I saw Mr. Gilbeau get off and get on the running-board and raise up his



(Testimony of P. C. Thompson.)

hand, as far as I remember, and then he jumped off and crawled out. I know that he started to run along with the other car and commenced shooting. The other car went on. Just then we didn't follow the other car. We went to Ronan and came back. On the way back Ramsey got in with us. We came back to the place where there had been some shooting, [79] and from there we followed up to what we thought was the track of the other car. I couldn't swear they were the tracks of the other car. It was a traveled road we followed; it was not a very well traveled road. I didn't notice that anything was picked up along there, nothing whatever.

Cross-examination by Mr. WHEELER.

I don't remember whether I got out of the car the second time when we came back. I saw Ramsey and Gilbeau both get out. I am not so sure about Gilbeau, but I believe he was out; I know Mr. Ramsey went out. If I remember right they went behind the car. As to picking up bottles, they picked up something, I don't know what they did with them. I remember something was picked up, but he didn't show it to me. When we first came along there and passed that other car, Gilbeau held up his hand. He wasn't necessarily along the side of the car, he was probably along behind it. He hollered, but when I heard him holler he was on the running board. I don't remember what he hollered. I don't know whether he hollered to Hull to stop.

Redirect Examination by Mr. BESANCON.

As to this other car, there were no side curtains

(Testimony of P. C. Thompson.)

on it at all, on our car or on Pablo's car. The curtains were down, I mean the side curtains, and I could see people in the car. Answering [80] the Court's question will say, as far as I remember they were down. I could see the driver. Cannot recollect whether that is all I could see or not, I sure must have. I cannot remember who it was, but do remember seeing the driver very well. I knew who the driver was, but don't know who else was in the car. I knew the driver was Phil Hull. I didn't see or notice any women or children.

Recross-examination by Mr. WHEELER.

When the curtains are down there are pieces of isinglass on the curtains so that I could look right through into the car.

Witness excused.

**Testimony of Mrs. Joe Pablo, for Defendant.**

Whereupon Mrs. JOE PABLO was called and sworn as a witness on behalf of the defendant and testified as follows:

Direct Examination by Mr. BESANCON.

My name is Mrs. Joe Pablo, and I am the wife of the defendant. I remember when my husband came to our place on the 5th of October. Charley Hunter and Phil Hull were with him. They got out and had lunch and we all started out again. As to there being any liquor in the car, I didn't see anything, didn't see any on the front seat or anywhere about the car. I went with them and the children. The curtains were all on the car when we started out.

(Testimony of Mrs. Joe Pablo.)

[81] We couldn't look out. It was raining hard when we left. We overtook Louis on the other side of Ravalli. He got into the car and went on with us. Close to the line by the Reservation there was a car that overtook and passed us, and then I heard some shooting. I couldn't tell how many shots because I was hollering; one of my little girls was half falling out and I was attending to her. I was sitting in the back seat with Joe. I didn't see anybody throw out any liquor, didn't see anything at all like that. I didn't see Hunter take out two bottles and break them nor anything of the sort, because I was busy with my children. From there we went on to Louis' place and stopped at Louis' place. I didn't see any liquor along that road anywhere after that.

Cross-examination by Mr. WHEELER.

I didn't know Mr. Gilbeau, except that I have known him since I have been here. When they turned off the road I was busy with my children. As to whether Hunter might have broken some bottles there and I not have seen it or know about it, I couldn't say, but I think that he did. I couldn't swear that he did or not, but I don't think so because there wasn't any whiskey in the car when we got in.

Redirect Examination by Mr. BESANCON.

I know Blue-eyed Mary's place. She is my grandmother. Mr. and Mrs. Kirkpatrick lived at such place. I was there about the 5th [82] of September, Mrs. Kirkpatrick, myself and my grandmother. Something happened there about liquor. There was a time that Joe, Henry, my father and Lawrence



(Testimony of Mrs. Joe Pablo.)

Pritchett came up there, but I couldn't very well see them. They went up towards the stack, and all that I could see through the window was Lawrence Pritchett handing a bottle to Joe. That is all that I remember there. I didn't go out to the hand game at all. I went to Missoula with Joe on a joy trip that Sunday, about two o'clock. Mrs. Kirkpatrick was with us. We stayed in Missoula about an hour, I think, and then went back. This was after the time I had seen Lawrence passing the bottle to Joe. There was no liquor in the car at all going out, because I never allow it in the car when I am along. Nothing was said about liquor.

Recross-examination by Mr. WHEELER.

I am the sister of Henry Matt who testified here this morning. When Henry Matt and Lawrence Pritchett came over there I saw them come up there, but they went right on towards the stack. Joe was there also. I watched them all the time and saw them have a bottle; saw Lawrence hand a bottle to Joe. He got it some place around the stack.

Witness excused.

**Testimony of Mrs. Lucy Kirkpatrick, for Defendant.**

Whereupon Mrs. LUCY KIRKPATRICK, called and sworn as a witness on behalf of the defendant, testified as follows: [83]

Direct Examination by Mr. BESANCON.

My name is Lucy Kirkpatrick. I made a trip to Missoula with Joe Pablo and his wife about the 5th of September. I did testify this morning about seeing Lawrence Prichett and the rest drink at the hay-



(Testimony of Mrs. Lucy Kirkpatrick.)

stack. As to who got the bottle, it looked like it was Lawrence Pritchett, he was the closest one towards the house and the nearest to me. I saw him with a bottle because he drank out of it, passed it around, and then threw it down. He was the last one that emptied the bottle. We didn't come to Missoula after that but before that, on the same day. We came to Missoula first, and then the next day this happened at the haystack. There was more than one incident at the haystack; there were four of them, I think. I don't mean there was four times I saw them but there were four men at the stack. I came in with them to Missoula and went back with them. I didn't see any liquor in the car going back, didn't see any at all, and if there was any liquor in there I wouldn't go back with them. I know Lawrence Pritchett, but not very well. My home is in Arlee; I have lived there all of my life. I don't know the general reputation of Lawrence Pritchett for truth and veracity.

Cross-examination by Mr. WHEELER.

I first came into Missoula with Joe and Mrs. Pablo in [84] the car, and then when we came back I took Mrs. Pablo over to her grandmother's, and I don't know whether it was Sunday, or what day it was, but she came with me that night. Joe said he was going home. Mrs. Pablo stayed there all that night with me. Afterwards Joe came back again. I believe it was in the morning. Then Henry Matt and Lawrence Pritchett came back with him, and that was when I saw the whiskey. As to there being any

(Testimony of Mrs. Lucy Kirkpatrick.)

whiskey in the automobile, I couldn't swear whether there was or not, because I didn't see any. Will say that Mrs. Joe Pablo and I are not very good friends. When you asked me this morning about coming to Missoula with them I didn't want to say it because I was a little nervous over it.

Redirect Examination by Mr. BESANCON.

I just made one trip with them to Missoula and have never been around them since. When we came back Joe didn't go to this place where we were camping. He didn't go there at all, but told us he was going home. We had to cross the creek over a little foot-bridge about that wide. Joe didn't cross the creek. Mrs. Pablo and I went on home.

Witness excused.

**Testimony of Mrs. Octave Couture, for Defendant.**

Whereupon Mrs. OCTAVE COUTURE, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON. [85]

My name is Mrs. Octave Couture, and I live about two miles east of Arlee and have lived there for about twenty-four years. I remember the 5th of October, when Joe Pablo and the party that was with him in an *automobile* up to our place. I recognized Joe Pablo, saw Phil Hull, the driver, Lawrence Pritchett and Charley Hunter. They stayed there maybe fifteen or twenty minutes. I looked out of the door to see what they were doing, and watched them for about that length of time. I didn't go out to see them. As to their being drunk or sober, they looked

(Testimony of Mrs. Octave Couture.)

as though they had been drinking, and I looked to see if they were drunk or sober. I didn't see them drink there while I was looking at them. I didn't hear any mention made there about it, and I didn't take any interest in it whatever. I know the witness Lawrence Pritchett and have known him four years, maybe a little longer, somewhere along there. As to knowing his general reputation in Arlee and the community around there, for truth and veracity, I do pretty well, and that reputation is bad.

Cross-examination by Mr. WHEELER.

I didn't see my husband take a drink out of a bottle when they drove up there. I was very busy in the kitchen, and I looked out there and saw them, but whether they were drinking whiskey or not I couldn't say. I went to see if there was any liquor because I was afraid. I didn't see any liquor. I was not [86] there very long. I was just on the steps, and I didn't go out there, because it didn't interest me at all.

Witness excused.

**Testimony of Archie Grant, for Defendant.**

Whereupon ARCHIE GRANT, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

I am living close to Arlee at the present time, and have lived in that community six years. I am acquainted with Lawrence Pritchett and have known him since he came there, I forgot just how long it is,

(Testimony of Archie Grant.)

several years ago. I know his reputation in that community at this time for truth and veracity, and it is bad.

Cross-examination by Mr. WHEELER.

I am friendly with Lawrence Pritchett and always speak to him. As to whether we are not on good terms, will say we are not on bad terms. It is not a fact that I have it in for Lawrence Pritchett because I thought he had been working for the Government and had made some report on me. As to my business, I have been farming there for five or six years, but I am not farming at the present time. I am living in Arlee; not with my wife.

Witness excused.

**Testimony of Frank Kirkpatrick, for Defendant.**

Whereupon FRANK KIRKPATRICK, called and sworn as a witness on behalf of the defendant, testified as follows. [87]

Direct Examination by Mr. BESANCON.

I live at Arlee and have lived there three years, I think. I know Lawrence Pritchett, and have known him all that time. I know his general reputation in Arlee and in that community for truth and veracity, and that reputation is bad.

Cross-examination by Mr. WHEELER.

I heard that Lawrence had been working for the Government in times past, but didn't know whether it was true, or not, I couldn't say. I have heard that he was, and it is a fact that I have been a little sore at Lawrence Pritchett. I haven't very much use for



(Testimony of Frank Kirkpatrick.)

him; he gave me a little trouble last fall, family trouble. He didn't give me some whiskey down there.

Q. You did not want to testify in this case this morning, did you?      A. (No response.)

Witness excused.

**Testimony of Mrs. Louis Pablo, for Defendant.**

Whereupon Mrs. LOUIS PABLO, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is Mrs. Louis Pablo. I live three and a half miles northwest of Ronan. I was home last October the 5th, and remember Joe Pablo's party coming to my place. The machine stopped [88] at our place and Louis stayed there. They went by and stopped about fifty yards from our place. As to seeing those people that evening and the rest of the day, I just saw them that evening when they got back. I didn't see any liquor at all. When they reached our place every one of them was sober.

No cross-examination.

Witness excused.

**Testimony of Joe Pablo, for Defendant (Recalled).**

Whereupon JOE PABLO, the defendant, was recalled in his own behalf, and testified further, as follows:

Direct Examination by Mr. BESANCON.

On the 5th of October I came into Missoula, and went out on the 5th. I didn't come into town the day

(Testimony of Joe Pablo.)

before that. I came to town about three o'clock in the afternoon. I left on the 5th, but when you ask me if I had stayed in town, will say I came in on the 4th and went home on the 5th, that is it. We came in the day before, and coming in the machine stopped out near town. I didn't notice what took place. I believe somebody got out, but I didn't pay any attention. I didn't see anybody hide a bottle there that day.

No cross-examination.

Witness excused.

The defendant rests. [89]

### REBUTTAL.

#### **Testimony of Harry Pritchett, for Plaintiff (in Rebuttal).**

Whereupon HARRY PRITCHETT, called and sworn as a witness on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination by Mr. WHEELER.

My name is Harry Pritchett. I live at Arlee, and farming. My farm is about a mile from Arlee. This is my father's place. I have lived there about five years. I know the defendant Joe Pablo. I remember when the hand game was going on outside of Arlee, on the river, I saw the defendant, Joe Pablo, there. That was the 5th or 6th of September, I think, somewhere along there. I didn't have any conversation with him at that time to amount to anything. I saw him there.

Q. Well, what did you do, or what did he say to you, if anything?

(Testimony of Harry Pritchett.)

By Mr. BESANCON.—We object to that, because he has already said that he had no talk with him, about anything.

By the COURT.—His judgment of what amounted to anything may not be the same as the jurors'.

By Mr. BESANCON.—We object further upon the ground that it is not a proper impeaching question.

By the COURT.—I know, but it may serve other purposes. You can always contradict the defendant on material matters. The objection will be overruled.

Exception taken by the defendant. [90]

As to what I or Joe did and what he said to me, well, he talked to me a couple of times, maybe, and called me up and gave me a drink. The first time there was nothing much said. There was a party there, and somebody called me, I think it was Joe Pablo. I went back where the bunch was and they passed the bottle around, a pint I think it was, and so I took a drink out of it, and I walked along. As to who passed it around, Joe Pablo did, I am not sure of that point, where it started from. We did take another. As to how we came to go a second time, Joe, he called me himself and gave it to me, I mean Joe Pablo. When he called me off he passed the quart bottle to me and I took a drink out of it. This was a quart bottle of whiskey. I couldn't say for sure whether this was Sunday night, or Monday night. When he called me off the second time, I don't know for sure whether there was anybody pres-

(Testimony of Harry Pritchett.)

ent or not. After that time I saw him again, and took another drink with him after that. This was out of a quart bottle. I don't know whether it was the same bottle, or not. I don't know whether anybody stood by me as I went and took a drink, or not. The third drink was taken about half-way between the hand game and the river. That was about a hundred yards.

Cross-examination by Mr. BESANCON.

I don't mean to say that I went out there alone with Joe the last time. I don't know just who was there. As to whether [91] I can name some that were there, will say that it was dark or near dark that night, and there was a bunch standing around there. I didn't know them at all. I don't know whether they was drinking, or not. This bunch didn't follow Joe and I from the big crowd. As to whether they were there, will say, there was possibly scattered all around, people all around there, we walked past this crowd a little ways. As to whether Joe had a bottle with him when we walked out, I don't know. When he got out there he pulled out a quart bottle of whiskey. As to whether he pulled it out or somebody gave it to him first, I think somebody must have given it to him,—he pulled it out of his pocket and gave it to me. The crowd was around there close to him. As to whether my brother Lawrence was there, I couldn't remember. I don't think he was there then. He was at the hand game, I think. As to seeing any of this drinking party around there, I couldn't say for sure whether I did



(Testimony of Harry Pritchett.)

or didn't now. As to how many bottles I saw there, I saw this pint the first time, and then I got a drink out of the quart bottle twice afterwards; so I am sure I saw at least a pint and a quart. I didn't see any other bottles around there.

Witness excused.

**Testimony of Frank Kirkpatrick, for Plaintiff (in Rebuttal).**

Whereupon FRANK KIRKPATRICK was called and sworn as a witness on behalf of the plaintiff in rebuttal, and testified as follows:

Direct Examination [92] by Mr. WHEELER.

I don't think I was over at Blue-eyed Mary's place on Sunday morning, September 5th, 1915; I don't remember. If I was over there I would know it, but I don't believe I was there at all. It was on Monday, I think Monday morning, that I was over there with Henry Matt, Lawrence Pritchett and Joe Pablo. I went to Missoula on Sunday afternoon. It was after that time that I was over to Blue-eyed Mary's place.

No cross-examination.

By Mr. WHEELER.—The Government rests.

By Mr. BESANCON.—We wish to call Joe Pablo again for a question or two.

By the COURT.—Very well.

**Testimony of Joe Pablo, in His Own Behalf (in Surrebuttal).**

Whereupon JOE PABLO was called in his own behalf, in surrebuttal, and testified as follows:

Direct Examination by Mr. BESANCON.

I heard what the witness Harry Pritchett testified just now as to whether at that hand game I called Harry Pritchett away and asked him to leave the bunch of people there and give him a drink, will say that I did not. I did not give Harry Pritchett any drink from any bottle that day. I didn't have any liquor at all myself there on that day. Lawrence Pritchett had some that day. I did not give a drink to Harry Pritchett that day. [93]

Whereupon the defendant rested in surrebuttal.

Witness excused.

This was all the testimony introduced in the case, and thereupon the defendant respectfully requested the Court to give the jury the following requested instructions:

**Instructions Requested by Defendant.**

1. An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

2. You are instructed as a matter of law, that if you believe from the evidence that the witness Lawrence Pritchett actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.

3. The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

4. Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a [94] covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still this is not sufficient to convict the defendant unless you further find, beyond a reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and in this way introduced by him into the Flathead Indian Reservation.

Filed and entered April 13, 1916.

GEO. W. SPROULE,

Clerk.

All of which the Court refused, and to which the defendant duly excepted.

Thereupon the counsel for the respective parties proceeded with the arguments to the jury, and during the argument Mr. Wheeler, United States attorney, read to the jury a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by Mr. Wheeler

was substantially the following (and as found at the top of page 91 of the transcript of evidence) :

Q. Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right, did you, before going to the hand game, go down to the Chinaman and get a bottle? [95] A. I believe I did, yes.

Whereupon Mr. Besancon objected to the reading of this part of the testimony by the district attorney unless he would also read the questions and answers following and as shown by the record.

By the COURT.—Of course, he has the right to read the testimony. He is not obliged to read it all unless his own sense of what ought to be done suggests it to him.

To which ruling of the Court the defendant then and there duly excepted.

The case was argued to the jury by respective counsel for plaintiff and defendant, and the Court then instructed the jury as follows:

### **Instructions of Court to Jury.**

(Delivered orally by the Court.)

Gentlemen of the Jury: Remember the Court states to you the rules of law; but what is proven in a case by the evidence in the case, by the evidence is entirely for you. The indictment is not evidence. In the three counts the defendant is charged on September 5th, September 6th and on October 5th of last year of having unlawfully introduced whiskey into the Indian country,—the Flathead Indian Reservation. You might find the defendant guilty of all



of the charges or you might acquit him of all; or you might find him guilty of one, and acquit him of the other two, depending entirely upon what is your opinion, your judgment in view of the evidence.

[96]

The law is that anyone who takes whiskey into the Indian country has committed an offense against a law created by Congress, and if he is convicted by a jury, he is to be punished as the law directs.

The dates in the indictment are not very material, and I think you can see that the evidence very closely fits the date set forth therein.

The defendant is presumed to be innocent, and this presumption you keep in mind until you find from the evidence that that presumption of innocence is overcome, and that the defendant is guilty beyond a reasonable doubt, then it is your duty to convict him. Keep before you also the fact that he is to be found guilty only beyond a reasonable doubt; not beyond all doubt, or any doubt, not beyond the possibility of a doubt, because it is possible to doubt anything. There is nothing capable of absolute proof except some problems of science and mathematics.

A reasonable doubt means that there is something in the evidence or something lacking from the evidence that leads you to say, after you have considered it all, that it is reasonable to doubt the guilt of the defendant, that causes you to pause and say you do not have an abiding conviction to a moral certainty that the defendant is guilty as charged; and if, after you have reviewed all of the evidence, that is your conclusion, honestly arrived at, then you have what the

law terms a reasonable doubt, and that presumption [97] of innocence demands the acquittal of the defendant. It is for the Government to prove the guilt of the defendant beyond a reasonable doubt. An accused person is never required to prove that he or she is innocent; but when you come to determine whether the Government has proven the guilt of the defendant beyond a reasonable doubt, you do not look to the Government's evidence alone, but you take it all into consideration, the evidence for the Government, and the evidence for the defendant as well, and compare it together and see where the highest degree of probability lies, what is reasonable and what is not, what in your judgment is proven what conclusion it is proper for your judgment to arrive at, and then you declare the result unhesitatingly by your verdict. You draw your conclusions, you test the credibility of the witnesses in the case, where the truth lies; you determine the credibility of the witnesses by his or her motives, by his or her interest, if any they have. You observe their demeanor upon the witness-stand, whether they appear to you to be frank in an endeavor to aid you to arrive at a correct solution of the case, or whether they appeared to be endeavoring to cover up something, or to conceal the truth. You observe whether the witnesses have contradicted themselves, whether they have a good memory, or a lapse of memory, where it is reasonable that they should forget, and whether they are contradicted by other witnesses, whether what they state now is reasonable or unreasonable, and having in view all of those things that in your judgment ought

to affect the credibility of the [98] witnesses, and you determine all of those things for yourselves. You determine for yourself whether the witnesses are telling the truth, and when the defendant takes the witness-stand himself, remember he is the defendant; that he is charged with a serious offense, and that the consequences are grave to him, if he is convicted, that he has great interest in the case, and you observe his demeanor and also take into consideration what he tells you, whether reasonable or unreasonable in view of all the other evidence; whether he is contradicted, you determine, and whether his interest prompts him to depart from the truth in order to protect himself.

It appears in this case that one of the witnesses for the Government, Hunter, and the defendant, both of them, have heretofore been convicted of this same, or a like offense. That is allowed to go into evidence solely that you might take it into consideration in determining their credibility, and if you believe it impeaches their credibility, that because of it they are not likely to tell the truth, why, it is for you to determine how far it detracts from the weight to be given to their evidence, and it is for you alone.

In this case the evidence is brief and the Court will not review it. The first charge is, with reference to the introduction of liquor at Arlee, and it is a question for you whether the defendant took it there. There is evidence tending to show that he was in possession of liquor, and gave it to some parties. There is also evidence tending to show that he did not; that is to say, there [99] are witnesses that swore he



did have it there, and witnesses, that he himself, at least, did not have it.

Now these things you keep in mind and determine where the truth lies. Lawrence Pritchett swore to you that the defendant had liquor there, whiskey, there at Arlee and gave it to him. That was in the Indian country. Now, with reference to Henry Matt, the court was a little in error in correcting counsel. Henry Matt didn't say really that this defendant gave him whiskey there. What the defendant did say was, that Henry Matt and Pritchett went to the restaurant, to the "Chinks," as he said, I suppose Matt went along, and, he says, the defendant asked the Chinaman for a quart of whiskey; then, he says, they walked off. Whether he meant that the defendant and the Chinaman walked off, or the three of them, I don't know. He says, they came back with a quart of whiskey and they drank it all up, drank it at Blue-eyed Mary's. Now, it will be for you to say what Matt meant by that. I will say, that if it is uncertain and ambiguous or there is any doubt about it, it ought to be resolved in favor of the defendant. Then you have the testimony of Lawrence Pritchett, that the defendant gave him and Matt whiskey; then you have the testimony of the other parties that they took three drinks. If you believe that the defendant had whiskey there, it is for you to infer whether he introduced it into the Indian country or not, whether he brought it there. If he brought it there, if he brought it from Missoula, he certainly introduced it [100] into the Indian country. If you find that he got it at the



Chinaman's, then the law would be that the Chinaman's place is in the Indian country. Blue-eyed Mary's place is within the Indian country. Now, the Indian country; every place in the reservation is Indian country. If a man carries liquor, get liquor into the Indian country, and somebody has already taken it there, if he carries it a substantial distance to some other part of the Indian country, he or she, of course, is introducing it into the latter part of the Indian country, and so would be introducing it into the Indian country under the law. So, if the distance from the Chinaman's to the hand game,—if the defendant got whiskey and carried it to the hand game,—is not in your judgment a sufficient distance to be considered substantial, not a distance to warrant you in finding the defendant guilty, that is an inference for you to draw, and to determine accordingly; it is for you to say whether that would be an introduction into the Indian country. With reference to liquor in the Indian country in the automobile when they were going to the Sanders ranch, this liquor was taken from the Chinaman, that is, there is evidence tending to show it,—if the defendant took it there, and did not know it was there, that is a question for you to determine. But that is not very important other than it might tend to aid you in determining whether the defendant had liquor there at all,—because he denies it. There is not proof that the Sanders ranch is in the Indian country, so we [101] cannot say that going to the Sanders ranch was introducing liquor into the country. This circumstance you can have in mind.

With reference to the other matter, taking the liquor from Missoula by way of Arlee into Ronan, and the departure from the road between Ronan and the Mission you have heard the testimony of Pritchett and Hunter, and the testimony of the defendant as to the giving of the money to Hunter. I will not recite the relations existing between Hunter and the defendant, if any there were. The defendant denies it. Hunter says that the relation of master and servant existed either before or after the taking of that liquor into the reservation. If Hunter was an accomplice of the defendant, Hunter is just as guilty as the defendant, and it is for you to determine whether he is trying to clear his own skirts or swear the defendant into it. I don't say that he has; don't intimate that at all. You observed him on the witness-stand,—that is for you to say. While the Government may prosecute men for a crime, the Government is not bound to prosecute them all, or prosecute them all at the same time. You understand the contest that is going on in society between the element breaking the law, and the element that is observing the law. You must take into consideration the fact that the Government has a right to call one party, or two parties, who have committed a crime, to testify against the other,—and that is the situation here. Hunter is possibly as guilty as the other defendant, but the Government has called him in to aid it in the prosecution. Sometimes it is as important to have the one as the [102] other; but society has the right to the statement of one against the other; and you must keep that in view. You must also

view the testimony of an accomplice with caution, see whether he is corroborated or not; see whether his statement is reasonable. That is all for you to determine.

As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice. You have heard the defendant say that he did not know that this liquor was put in the automobile, took no part in it. The law is, if this was the defendant's liquor carried on to the reservation, of course, he is guilty as charged. But if it was not his liquor, he would not be guilty unless he knew it was going to the reservation, and knew it was taken on there, and you would judge that by the facts and circumstances in the case. Certainly, if that was Hunter's liquor, and this defendant did not know anything about it, he is absolutely guiltless of that part of it, and at that particular time, on the 6th of October. But if he knew that Hunter had four or five quarts of whiskey in his auto, drinking it up on the road before they got to the reservation, why then, the natural and reasonable inference was that he knew he was going to the reservation, because he was taking Hunter along to the reservation. That is for you to determine. You have heard the testimony with reference to what happened when [103] Gilbeau stopped them. Now, the inference to be drawn from that is, that if an accused person is about to be held up by an officer, and he believes he is going



to be held up, you have the right to take it into consideration, the same as the other evidence in the case. But, if he satisfactorily explains to you, and tells you, and causes you to believe that he imagined he was going to be held up by a highwayman, why, the act of fleeing would not be a fact from which you ought to infer guilt. That is a question, whether he fled to get away, to destroy the evidence, or whether he did not have the liquor at all. That is for you to determine.

There is one other matter, character. The character of Lawrence Pritchett was impeached. Three witnesses testified in the community in which he lived that his reputation for truthfulness is bad. Now, you have that in mind, and you determine for yourselves, in view of all the evidence, what his reputation was, and how far he told the truth, and also look to that to see whether he was telling the truth. A man's reputation is a priceless possession. If it is a good reputation for truthfulness, it goes to the weight of his testimony. A bad reputation of a witness, it seems to me, ought to detract from the weight of his testimony; unless you believe that when he is put on the witness-stand, and under oath, he will tell the truth though he might lie to his neighbors, and have a reputation for untruthfulness. As I told you before, you are the exclusive judges of the credibility of the witness, and [104] the weight to be given to all of the testimony.

Gentlemen, the case is for you. When you retire to your jury-room, you will select one of your number as foreman, and proceed to a verdict. The



Court will conclude as it began, the defendant is presumed to be innocent, and unless you find from the evidence that he is guilty beyond a reasonable doubt, you will acquit him. Are there any exceptions?

By Mr. BESANCON.—May we have an exception to the failure of the Court to give defendant's proposed instructions 1 to 4, both inclusive.

By the COURT.—Very well, the instructions will be filed, and the exception will be noted.

Thereupon the jury retired, and subsequently returned into court the following verdict:

**Verdict.**

We, the jury in the above-entitled case, find the defendant, Joe Pablo, guilty in the manner and form as charged in the indictment on Count Three thereof, and not guilty on Counts One and Two.

H. H. MONTGOMERY,

Foreman.

And thereafter, on the 17th day of April, 1916, and before the sentence of the court, the defendant made and filed a Motion in Arrest of Judgment, which said motion is as follows: [105]

(Title of Court.)

(Title of Cause.)

**Motion in Arrest of Judgment.**

Now comes the defendant, Joseph Pablo, in his own proper person, the Court being about to pronounce sentence and judgment, upon the verdict of the jury returned into court in this cause, and moves the Court to arrest the judgment upon the third count of the indictment upon which this defendant

was found guilty by the jury, and assigns as reasons why the judgment should be arrested the following, to wit:

1. That the evidence was insufficient to warrant the jury in finding the defendant guilty upon the third count of the indictment.

2. That the Court erred in failing to instruct the jury to acquit the defendant upon the third count of the indictment.

3. That the evidence does not prove nor tend to prove that the defendant knowingly conveyed whiskey or other intoxicating liquor in his automobile into the Flathead Indian Reservation or from place to place within such reservation.

4. That the evidence does not prove nor tend to prove that the bottles and liquor testified as being in the automobile at certain points within the reservation was the same or parts of the same that other evidence on the part of the Government tended to prove was in the automobile when it left Missoula or in it at any [106] place while the same was off the reservation and on the same trip.

5. That the evidence does not prove nor tend to prove that any whiskey or intoxicating liquor such as described in the indictment, owned by the defendant or obtained by him, was by him knowingly introduced by him into the Flathead Indian Reservation.

JOSEPH PABLO,  
Defendant.

JOHN P. SWEE,  
A. BESANCON,  
Attorneys for Defendant.

Service of the foregoing acknowledged and copy received this 17th day of April, 1916.

B. K. WHEELER,  
United States Attorney.

Filed April 17, 1916. Geo. W. Sproule, Clerk.

This motion in arrest of judgment being submitted to the Court and urged by the defendant and on said date, to wit, April 17th, 1916, the Court ordered that said motion be, and the same was denied.

To which ruling of the Court the defendant then and there duly excepted, and his exception was noted. [107]

Thereafter, on the 17th day of April, 1916, the Court passed sentence upon the defendant and entered a judgment and order adjudging that the defendant, Joseph Pablo, be confined and imprisoned in the county jail of Missoula County, Montana, for the term of seventy-five days and that he pay a fine of one hundred dollars and costs, and that the usual order be made relative to such fine and costs; and to which judgment and sentence of the court the defendant then and there duly excepted.

Thereafter and at the time stated herein, the defendant interposed a motion for new trial, the same being in words and figures following, to wit:

(Title of Court.)

(Title of Cause.)

### **Motion for New Trial.**

Comes now the defendant, Joseph Pablo, and moves the court to set aside the verdict of the jury

finding him guilty on the third count of the indictment against him and to grant him a new trial herein, for the following reasons, to wit:

1. That the evidence is insufficient to warrant the jury in finding the defendant guilty on the third count of the indictment.

2. That the Court erred in failing to instruct the jury to acquit the defendant.

3. That the verdict is contrary to law and the evidence. [108]

4. That the jury, after this cause had been submitted to them and after retiring to deliberate upon their verdict, separated and disbanded and spent a large part of the night separate and apart from one another, and this before they had agreed upon a verdict and without leave of the Court and contrary to the express directions of the court, and after having so disbanded and separated again in the morning assembled together and then reached and agreed on the verdict submitted.

5. That the Court erred in refusing to give the defendant's instructions numbered 1 to 4, both inclusive, and as requested by him in writing.

6. The Court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.

7. The Court erred in overruling the defendant's motion to arrest judgment.

8. The Court erred in passing sentence upon the defendant.

9. Errors in law occurring at and during the pro-



ceedings of the trial and excepted to by the defendant.

Said motion is based upon all the papers, pleadings and files herein, upon affidavits to be filed before the hearing of this motion for a new trial, and upon a bill of exceptions to be served and filed for allowance within the time allowed by the court.

Dated April 17th, 1916. [109]

A. BESANCON,

JOHN P. SWEE,

Attorneys for Defendant.

Service of the foregoing Motion for New Trial and receipt of copy accepted this 17th day of April, 1916.

B. K. WHEELER,

United States Attorney.

By FRANK WOODY,

Assistant.

Filed April 17th, 1916. Geo. W. Sproule, Clerk.

On the same day, to wit, April 17, 1916, on the filing of a written stipulation by and between the United States attorney and the attorneys for the defendant and requesting the Court therefor, the Court granted the defendant thirty days additional to the statutory time in which to prepare, serve and file for allowance a bill of exceptions in this case.

**Order Settling and Allowing Bill of Exceptions.**

AND NOW, in furtherance of justice and that right may be done, the defendant, Joseph Pablo, tenders and presents the foregoing as his Bill of Exceptions in this case to the action of the Court, and prays that the same may be settled and allowed

and signed and sealed by the Court and made a part of the record; and [110] the same is accordingly done this the 30 day of June, 1916.

BOURQUIN,  
District Judge.

Service of the foregoing Bill of Exceptions acknowledged and copy received this 25 day of May, 1916.

B. K. WHEELER,  
United States District Attorney.  
By FRANK WOODY.

Received by the clerk for delivery to the court this 25 day of May, 1916.

GEO. W. SPROULE,  
Clerk United States District Court.  
By Harry H. Walker,  
Deputy.

Filed this 30th day of June, 1916. Geo. W. Sproule, Clerk United States District Court. [111]

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Thereafter, on October 2, 1916, Defendant's Assignment of Errors was duly filed herein, in the words and figures following, to wit: [112]

*In the District Court of the United States, for the  
District of Montana.*

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
JOSEPH PABLO,  
Defendant.

### **Assignment of Errors.**

The defendant in this action, in connection with his petition for a writ of error, and after the denial of his motion for a new trial, specifies and makes the following assignments of error, which he avers exist.

1. The Court erred in admitting certain evidence over the defendant's objections thereto and excluding certain evidence excepted to by the defendant at the time of the trial, as follows, to wit:

2. The Court erred in allowing the witness Charles Hunter to testify, and in overruling the objections of the defendant on the ground that said Hunter had been convicted of a felony and in accepting the telegram as evidence that said witness had been pardoned and restored to citizenship.

3. The Court erred in allowing the witness Andrew Gilbeau to testify relative to the kind of bottles which he picked up and the particular labels upon the same and this without requiring the said witness to produce the said bottles and labels or account for them.

4. The Court erred in allowing the following question to be asked of the witness Philip Hull and answered on cross-examination:

Q. Who was with you when that was cached the day before that?

5. The Court erred in allowing the following question to be asked the witness Harry Pritchett and answered:

Q. Well, what did you do or what did he say to you, if anything? [113]

6. The Court erred in permitting the United States attorney in his argument to the jury to read to them a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by said attorney was substantially the following:

Q. Well, now, if I had this right, the witness that mentioned it said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle?

A. I believe I did, yes.

And this without requesting said district attorney to read the questions and answers following the above and of said witness and as shown by the record.

7. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

8. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

You are instructed as a matter of law, that if you believe from the evidence that the witness Lawrence Pritchett actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.



9. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

10. The Court erred in refusing to give to the jury the following instruction requested by the defendant: [114]

Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still this not sufficient to convict the defendant unless you further find, beyond a reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and in this way introduced by him into the Flathead Indian Reservation.

11. In connection with the Court's refusal to give the defendant's proposed instructions relative to the witness Lawrence Pritchett being an accomplice, the Court further erred in instructing the jury, in re-

gard to said witness Lawrence Pritchett, in the following language, to wit:

“As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice.”

12. The Court erred in holding the evidence sufficient to warrant the jury in finding the defendant guilty.

13. The Court erred in denying the motion of the defendant in arrest of judgment.

14. The Court erred in passing sentence upon the defendant.

15. The Court erred in overruling the defendant's motion for a new trial.

Dated July 7th, 1916.

JOHN P. SWEE,

(By A. B.)

A. BESANCON,

Attorneys for Defendant.

In the District Court of the United States, for the District of Montana. No. ——. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Assignments of Error. Filed June —, 1916. ———, Clerk. Albert Besancon and John P. Swee, Attorneys for Defendant. Filed Oct. 2, 1916. Geo. W. Sproule, Clerk. [115]

Thereafter, on Oct. 2, 1916, defendant filed his Petition for Writ of Error herein, in the words and figures following, to wit: [116]

*In the District Court of the United States, for the  
District of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

**Petition for Writ of Error.**

Now comes the defendant, Joseph Pablo, and petitions this Court for a writ of error herein, and says:

That on or about the 17th day of April, 1916, the above-named court entered a judgment herein against the defendant, wherein and whereby the defendant was sentenced to be confined and imprisoned in the county jail of Missoula County, Montana, for a term of seventy-five days and to pay a fine of One Hundred Dollars, and costs taxed at \$294.10, for the alleged offense of introducing a large quantity of spirituous and intoxicating liquor into the Flathead Indian Reservation within the State of Montana and district of Montana. That in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which more fully and in detail appear from and in the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, will be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated July 8th, 1916.

JOHN P. SWEE and  
A. BESANCON,  
Attorneys for Defendant.

In the District Court of the United States for the District of Montana, No. 2732. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Petition for Writ of Error. Filed Oct. 2d, 1916. Geo. W. Sproule, Clerk. Albert Besancon and John P. Swee, Attorneys for Defendant. [117]

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Thereafter, on October 2, 1916, an Order Allowing Writ of Error was duly filed and entered herein, in the words and figures following, to wit: [118]

*In the District Court of the United States, for the  
District of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.



**Order Allowing Writ of Error.**

On this 2d day of October, 1916, comes the defendant, Joseph Pablo, by his attorney and files herein and presents to the court his petition praying for the allowance of a writ of error and his assignment of errors intended to be urged by them and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be presented in the United States Circuit Court of Appeals, Ninth Circuit, and such other and further proceedings may be had as are proper in the premises.

In consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of five hundred dollars (\$500.00), which will operate as a supersedeas bond.

GEO. M. BOURQUIN,

District Judge.

In the District Court of the United States for the District of Montana. No. 2732. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Order Allowing Writ of Error. Filed and entered Oct. 2, 1916. Geo. W. Sproule, Clerk. Albert Besancon and John P. Swee, Attorneys for Defendant.

[119]

Thereafter, on October 5, 1916, a Bond on Writ of Error was filed herein, in the words and figures following, to wit:

*In the District Court of the United States, for the  
District of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

**Appearance Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, Joseph Pablo as principal, and Andrew J. Brower and Addison M. Sterling, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Hundred Dollars (\$500), to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our and each of our executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of Oct. in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at the term held in April, 1916, of the District Court of the United States for the District of Montana, in a suit pending in said court between the United States of America, plaintiff, and Joseph Pablo, defendant, a judgment and sentence was rendered against the said Joseph Pablo; and

said Joseph Pablo has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit and a Citation directed to the United States of America citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, sixty days from and after the date of said citation, and which citation has been duly served: [120]

Now, the condition of the above obligation is such that if the said Joseph Pablo shall appear in the United States Circuit Court of Appeals for the Ninth Circuit on the first day of the next term thereof to be held at the city of San Francisco, within sixty days from the 5th day of October, 1916, and from day to day thereafter during said term and from term to term and from time to time, until finally discharged therefrom, and shall abide and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct if the judgment and sentence of the said District Court against him shall be affirmed by such Circuit Court of Appeals for the Ninth Circuit, then the obligation to be void; else to remain in full force, virtue and effect.

JOE PABLO. (Seal)

ANDREW J. BROWER. (Seal)

ADDISON M. STERLING. (Seal)

State of Montana,  
County of Missoula,—ss.

Andrew J. Brower and Addison M. Sterling, being duly sworn, each for himself says: that he is a resident of the county of Missoula and State of Montana and is a householder and freeholder therein, and that he is worth double the amount stated in the foregoing bond, in property in said State, over and above all his debts and liabilities and exclusive of property exempt by law from execution in the State of Montana.

ANDREW J. BROWER,  
ADDISON M. STERLING.

Subscribed and sworn to before me this 3d day of October, 1916.

[Seal] JOHN P. SWEE,  
Notary Public for the State of Montana, Residing at  
Ronan, Montana.

My commission expires Dec. 19th, 1917.

Approved Oct. 5th, 1916.

BOURQUIN,

Judge U. S. Dist. Ct. for the District of Montana.  
Filed Oct. 5, 1916. Geo. W. Sproule, Clerk. [121]



Thereafter, on the 5th day of October, 1916, a Writ of Error was duly issued herein, which said writ is hereto attached and is in the words and figures following, to wit: [122]

*In the District Court of the United States, for the  
District of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

**Writ of Error.**

The United States of America,—ss.

The President of the United States of America, to  
the Judge of the District Court of the United  
States for the District of Montana, GREET-  
INGS:

Because of the records and proceedings and also of the rendition of judgment and the sentence of the Court wherein the defendant, Joseph Pablo, was sentenced to be imprisoned in the county jail of Missoula County, Montana, and at Missoula, Montana, for a period of seventy-five days and to pay a fine of One Hundred Dollars and costs, for the crime charged of introducing a large quantity of spirituous and intoxicating liquor, commonly called whiskey, into the Flathead Indian reservation within the State and District of Montana and in violation of the statutes of the United States so made and provided, a manifest error has happened to the great

Witness the Hon. EDWARD D. WHITE, Chief Justice of the United States, this 5th day of October, in the year of our Lord one thousand nine hundred sixteen and of the independence of the United States the one hundred and forty-first.

[Seal]

GEO. W. SPROULE,

Due service of the above writ admitted and copy received at Helena, Montana, Oct. 5, 1916.

BURTON K. WHEELER,

**Answer of Court to Writ of Error.**

The answer of the Hon. GEO. M. BOURQUIN, the United States District Judge for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of the said District Court to the Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,

Clerk of the District Court of the United States for the District of Montana.

By C. R. Garlow,

Deputy,

No. 2732. In the District Court of the United States for the District of Montana. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Writ of Error. Filed July —, 1916. —, Clerk. [124]

[Endorsed]: No. 2732. In the District Court of the United States, for the District of Montana. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Writ of Error and Answer of Court to Same. Filed October 5, 1916. Geo. W. Sproule, Clerk. [125]

Thereafter, on October 5, 1916, a Citation was duly issued herein, which said Citation is hereto attached and is in the words and figures following, to wit:  
[126]

*In the District Court of the United States, for the  
District of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

**Citation on Writ of Error.**

The United States of America,—ss.

To Hon. T. W. GREGORY, Attorney General of the  
United States, and to B. K. WHEELER,  
United States District Attorney for the District  
of Montana, and to the United States of  
America:

YOU ARE HEREBY NOTIFIED AND ADMONISHED to be and appear at the Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office in the District Court of the United States for the District of Montana, wherein the United States of America is plaintiff and Joseph Pablo is defendant, to show cause then and there why judgment and sentence of the Court rendered against said defendant as in such writ of error mentioned should not be corrected and speedy justice be



done to the defendant Joseph Pablo in that behalf.

Given under my hand in the City of Helena in the District of Montana above named this the 5th day of Oct., A. D. 1916.

BOURQUIN,

Judge of the District Court of the United States for the District of Montana.

Due service of the above-named citation is hereby admitted as also the receipt of a copy thereof, at Helena, Montana, Oct. 5, 1916.

BURTON K. WHEELER,

United States Attorney, District of Montana. [127]

[Endorsed]: No. 2732. In the District Court of the United States, for the District of Montana. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Citation. Filed Oct. 5, 1916. Geo. W. Sproule, Clerk. [128]

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**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

United States of America,  
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 129 pages, numbered consecutively from 1 to 129, inclusive, is a full, true and correct transcript of the pleadings, process, orders, verdict and judgment, and all other proceedings had in said cause, and of

the whole thereof, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Writ of Error and Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-five and 55/100 Dollars, and have been paid by plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Helena, Montana, this 20th day of October, A. D. 1916.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy. [129]

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[Endorsed]: No. 2873. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Pablo, Plaintiff in Error, vs. The United States of America, Defendant in Error: Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed November 3, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

IN THE  
**United States Circuit Court of  
Appeals**  
FOR THE NINTH CIRCUIT.

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February Term, 1917.

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JOSEPH PABLO,

Plaintiff in Error,

*vs.*

THE UNITED STATES OF AMERICA,

Defendant in Error.

---

Upon Writ of Error to the United States District  
Court of the District of Montana.

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**Brief on Behalf of Plaintiff in  
Error**

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ALBERT BESANCON, of Missoula, Montana,  
and

JOHN P. SWEE, of Ronan, Montana,

Attorneys for Plaintiff in Error.

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IN THE  
United States Circuit Court of  
Appeals

FOR THE NINTH CIRCUIT.

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February Term, 1917.

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JOSEPH PABLO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

---

Upon Writ of Error to the United States District  
Court of the District of Montana.

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Brief on Behalf of Plaintiff in  
Error



## STATEMENT OF THE CASE.

The plaintiff in error, Joseph Pablo, was indicted by the United States grand jury for the District of Montana by an indictment containing three counts, each charging him with having, at the time stated, introduced intoxicating liquors upon the Flathead Indian Reservation in Montana; the first count being for about one quart of whiskey and on September 6th, 1915, the second count for about three quarts of whiskey on September 5th, 1915, and the third count for about four quarts of whiskey on October 5th, 1915.

To this indictment the defendant below entered a plea of not guilty, and the case came on regularly for trial before a jury on April 14th, 1916, at Missoula, Montana, the plaintiff and defendant below being represented by the counsel whose names now appear as the attorneys of record in this case.

Whereupon, testimony was introduced by and on behalf of the then plaintiff and defendant, and during the progress of the trial the defendant interposed various objections to evidence given and offered and took exception to various rulings of the court thereon and objected and took exception to other acts and omissions of the court, all of which will appear hereafter in this brief, and the questions involved and the manner in which they were raised and on which the plaintiff in error relies for a reversal of his conviction will be presented in

this statement of the case in the same numbered order as noted in the assignment of errors, also contained herein, and being as follows, to-wit:

I.

The plaintiff in error renews and again urges his general objection to the court's rulings in admitting and excluding evidence and as stated in the first, being the general specification of his assignments of error.

II.

The very first witness called by the plaintiff below was one Charles Hunter, and we here quote in full the proceedings that took place at that time and as appears by Tr. pp. 15-16:

"CHARLES HUNTER, being called as a witness, and being about to be sworn on behalf of the plaintiff, Mr. Besancon stated:

At this time we object to the witness being sworn to testify in this case upon the ground that he is incompetent to testify, having been convicted in this court of a felony, and judgment having been passed upon him in the month of February, 1914.

*By Mr. Murphy:* If the Court please, I have here a telegram pardoning the witness, and restoring him to citizenship.

*By the Court:* Well, they seem to have met the situation, Mr. Besancon.

*By Mr. Besancon:* Of course, we cannot question the telegram, but still we object to its being



received as evidence until the pardon itself is produced.\*

*By the Court:* The pardon is an act of the executive of the United States, and when it is brought into this court, it is entitled to judicial notice without any proof at all. Of course, when it said the President has done a certain act, the Court must take notice of it. I think the telegram satisfies the Court, that it is so at this time. The objection will be overruled.

Exception taken by the defendant.

*By the Court:* As a matter of course, if there was any mistake, why, it would always be cause for setting aside a verdict, should there be one, or of any judgment; so no harm can be done in proceeding.

Thereupon CHARLES HUNTER was sworn as a witness on behalf of the Government, and testified as follows:

DIRECT EXAMINATION—BY MR. MURPHY.

\*It was stated by the District Attorney that the telegram was from the Department of Justice that the President had pardoned the witness, Hunter, and the Court read the telegram.—B."

The examination of said Charles Hunter being allowed to proceed and, as will appear by Tr. pp. 17-26, said Hunter gave damaging testimony against the plaintiff in error, and the decisions of the court on the objections there made are here urged as error.

III.

On Tr. pp. 40 and 41 we find the testimony of one Andrew Gilbeau, a witness for the then plaintiff. After describing the course and direction taken by the defendant and those with the defendant such witness testified as follows:

“When I was going that road I saw them drinking out of bottles. When we came back we got a number of bottles there. This was after we came back. Liquor, that is, whiskey, had been in the bottles. I could tell by smelling of the bottles. These we picked up right alongside of the track, right where I seen that they were breaking the bottles. It was a pint bottle and a big bottle. I picked up parts of them and could tell there was labels on them. I picked up one bottle.”

*By Mr. Besancon:* We object to the witness testifying to the labels on the bottle. I think the witness said it looked like these pieces. The witness is not able to identify the bottle that he said he picked up.

*By the Court:* He can testify with reference to them, and you can cross-examine with reference to it. They are not bound to produce them. The objection is overruled.

(Exception noted by the defendant.)

The witness then proceeded to testify as to the label upon the bottle that he picked up, and further testified:

“I know it was a whiskey bottle and that whiskey was written on the label.”

It being urged as error to allow this witness to testify as to the marks or labels upon the bottle and the writings upon such labels without making him produce the bottle or account for its absence.

IV.

As to the objections made and exceptions taken as found on Tr. pp. 66, and being the foundation for the fourth assignment of error, although counsel for plaintiff in error believe there is merit to their position, still they are convinced that such errors, if any, there appearing are not sufficient grounds for the setting aside or reversing the judgment of conviction in this case and will not urge the same in this brief.

V.

On Tr. pp. 80 and 81 is found the testimony of one Harry Pritchett, a witness for the plaintiff in rebuttal. Such witness, after stating that he had seen the defendant, Joe Pablo, on the 5th or 6th of September at the hand game, near Arlee, further stated:

“I didn’t have any conversation with him at that time to amount to anything. I saw him there.”

Q.—Well, what did you do, or what did he say to you, if anything?

By MR. BESANCON—We object to that, be-

cause he has already said that he had no talk with him, about anything.

By the COURT—His judgment of what amounted to anything may not be the same as the jurors'.

By MR. BESANCON—We object further upon the ground that it is not a proper impeaching question.

By the COURT—I know, but it may serve other purposes. You can always contradict the defendant on material matters. The objection will be overruled.

(Exception taken by the defendant.)

The witness then proceeded to testify as to remarks and statements made to him by the then defendant and to certain acts of the defendant. It will be noted that the defendant had never been examined relative to any conversation he may have had with such witness nor any meeting with such witness, and consequently these questions asked of the witness, Harry Pritchett, and the testimony obtained from him was absolutely new and the bringing out of new matter having no connection with nor bearing upon any testimony given, either by the defendant or by any of his witnesses.

## VI.

On Tr. pp. 85 and 86 we find the following, which is here quoted in full:

Thereupon the counsel for the respective parties proceeded with the arguments to the jury, and during the argument Mr. Wheeler, United



States attorney, read to the jury a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by Mr. Wheeler was substantially the following (and as found at the top of page 91 of the transcript of evidence):

Q.—Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right, did you, before going to the hand game, go down to the Chinaman and get a bottle? A.—I believe I did, yes.

Whereupon Mr. Besancon objected to the reading of this part of the testimony by the district attorney unless he would also read the questions and answers following and as shown by the record.

By the COURT—Of course, he has the right to read the testimony. He is not obliged to read it all unless his own sense of what ought to be done suggests it to him.

To which ruling of the Court the defendant then and there duly excepted."

The above questions and answers being found in full in the testimony of the defendant on Tr. pp. 48 and 49, and we here quote the same in full, just as it appears in the record:

"Q. Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand

game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle? A. I believe I did, yes.

Q. Well, just tell us about that?

A. Well, I didn't see any whiskey there.

Q. What is that?

A. I didn't see anything there at all.

Q. You didn't see anything? A. No, sir.

Q. You didn't get any? A. No, sir.

Q. Well, did you see anybody get any at that time?

By the COURT—Did he answer you that he got a bottle of the Chinaman? Read the question to the witness.

Q. Did you, before going to the hand game, go down to the Chinaman and get a bottle before going to the hand game, did you see anybody get any whiskey at the Chinaman's?

A. No, sir."

We again call attention to the testimony of the defendant when being cross-examined by Mr. Wheeler and as found in Tr. p. 53, which is here quoted in full:

"I didn't get a bottle of whiskey at the Chinaman's. I had not obtained whiskey there before. I didn't say this morning that I got whiskey there at the other Chinaman's.

Q. Didn't Mr. Besancon ask you this morning if you had gotten liquor there at different times?

*By the Court*—Well, he did put sort of a double question to the witness, and asked him if he was not at the Chinaman's and got booze, and answered, I believe I was, I believe I did. Now, whether he was answering the first part of the question and told him he got the booze, or whether he was at the Chinaman's would be for the jury.

"I didn't get any whiskey at the Chinaman's at all. I saw no whiskey there and didn't have any drink at that place."

It will be noted from the above that such part of the testimony read to the jury by the district attorney when standing alone appeared to be an admission of guilt on the part of the defendant, which was intended to prejudice the minds of the jurors against the defendant and in showing to them conclusions from the testimony of the defendant that he admitted obtaining a bottle of liquor in the Chinaman's place just before starting on the automobile trip, while in fact all of the testimony of the defendant on such point was to the effect that he had not obtained any liquor there and had seen none there, etc.

The objections and exceptions there taken by the then defendant are here renewed, and it is here urged that such misconduct on the part of the prosecuting attorney was very prejudicial to the defendant.

## VII

The then defendant requested the court to give

the jury four instructions, being found in Tr. pp. 84, 85.

Instruction numbered 1 requested by the defendant was as follows:

1. An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

This instruction was refused by the court, to which the defendant duly excepted, and such refusal is here urged as error.

#### VIII.

The defendant also requested the court to give his instructions numbered 2, found on Tr. p. 84.

Instruction numbered 2 so requested by defendant was as follows:

You are instructed as a matter of law, that if you believe from the evidence that the witness, Lawrence Pritchett, actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.

This instruction was refused by the court, to which the defendant duly excepted, and here urges that such refusal was error.

#### IX.

The then defendant also requested the court to give the jury his instruction numbered 3, found on Tr. p. 85.

Said instruction numbered 3 so requested by the defendant was as follows:



The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witnesses; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

This instruction was by the court refused, to which the defendant duly excepted, and such refusal is here urged as error.

X.

The then defendant also requested the court to give the jury his instruction numbered 4, found on Tr. p. 85.

Said instruction numbered 4 so requested by the defendant was as follows:

Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still, this is not sufficient to convict the defendant unless you further find, beyond a reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and

in this way introduced by him into the Flathead Indian Reservation.

Said instruction was by the court refused, to which the defendant duly excepted, and such refusal is here urged as error.

## XI.

It will be noted that after the refusal of the court to give the defendant's requested instructions 1, 2 and 3, bearing on accomplices, their testimony, and the fact that the witness, Lawrence Pritchett, was an accomplice, the court then, in its instruction (Tr. p. 93) instructed the jury as follows:

As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice.

Counsel for the defendant excepted to the failure of the court to give the defendant's proposed instructions 1 to 4, and we believe in so doing properly excepted to the above court's instruction, which has the opposite effect to that which was requested and as will be pointed out in the argument hereafter. The witness, Lawrence Pritchett, was an accomplice and the defendant was not only entitled to an instruction to that effect, but certainly the giving of an instruction to the effect that Pritchett was not an accomplice is error and very prejudicial to the defendant.

The jury found the defendant guilty in the man-

ner and form as charged in Count 3 of the indictment and not guilty as to Counts 1 and 2. (Tr. p. 8.)

The plaintiff in error, Joseph Pablo, appeared in court in his own proper person and by his counsel, the court being about to pronounce sentence and judgment upon the defendant, and moved the court to arrest the judgment and assigned five reasons therefor in his written motion in arrest of judgment. (Tr. pp. 95, 96.)

The motion in arrest of judgment was denied, to which ruling of the court the defendant then and there duly excepted, and the court then sentenced the defendant to imprisonment in the county jail of Missoula County, Montana, for the term of seventy-five days and to pay a fine of \$100 and costs, which costs were taxed at \$294.10, and that he be confined in said county jail until said fine and costs were paid or otherwise discharged according to law, and judgment was duly entered thereon (Tr. pp. 9, 10), to which judgment and sentence the defendant then and there duly excepted.

Thereupon the defendant interposed a motion for a new trial, setting up nine grounds of error (Tr., pp. 97 to 98) and after the hearing thereon the motion for new trial was by the court overruled, to which the defendant duly excepted.

A bill of exceptions was prepared, allowed, settled and signed, which is set forth in the transcript in this case. (Tr. pp. 11 to 100 inclusive.)

Whereupon the defendant below sued out a writ of error to this court and specified the following:

ASSIGNMENTS OF ERROR.

The defendant in this action, in connection with his petition for a writ of error, and after the denial of his motion for a new trial, specifies and makes the following assignments of error, which he avers exist:

1. The Court erred in admitting certain evidence over the defendant's objections thereto and excluding certain evidence excepted to by the defendant at the time of the trial, as follows, to-wit:

2. The Court erred in allowing the witness, Charles Hunter, to testify, and in overruling the objections of the defendant on the ground that said Hunter had been convicted of a felony and in accepting the telegram as evidence that said witness had been pardoned and restored to citizenship.

3. The Court erred in allowing the witness, Andrew Gilbeau, to testify relative to the kind of bottles which he picked up and the particular labels upon the same, and this without requiring the said witness to produce the said bottles and labels or account for them.

4. The Court erred in allowing the following question to be asked of the witness, Philip Hull, and answered on cross-examination:

Q. Who was with you when that was cached the day before that?

5. The Court erred in allowing the following



question to be asked the witness, Harry Pritchett, and answered :

Q. Well, what did you do or what did he say to you, if anything?

6. The Court erred in permitting the United States attorney in his argument to the jury to read to them a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by said attorney was substantially the following :

Q. Well, now, if I had this right, the witness that mentioned it said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle?

A. I believe I did, yes.

And this without requesting said district attorney to read the questions and answers following the above and of said witness and as shown by the record.

7. The Court erred in refusing to give to the jury the following instruction requested by the defendant :

An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

8. The Court erred in refusing to give to the

jury the following instruction requested by the defendant :

You are instructed as a matter of law, that if you believe from the evidence that the witness, Lawrence Pritchett, actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.

9. The Court erred in refusing to give to the jury the following instruction requested by the defendant :

The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

10. The Court erred in refusing to give to the jury the following instruction requested by the defendant :

Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still, this is not sufficient to convict the defendant unless you further find, beyond a

reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and in this way introduced by him into the Flathead Indian Reservation.

11. In connection with the Court's refusal to give the defendant's proposed instructions relative to the witness, Lawrence Pritchett, being an accomplice, the Court further erred in instructing the jury, in regard to said witness, Lawrence Pritchett, in the following language, to-wit:

"As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice."

12. The Court erred in holding the evidence sufficient to warrant the jury in finding the defendant guilty.

13. The Court erred in denying the motion of the defendant in arrest of judgment.

14. The Court erred in passing sentence upon the defendant.

15. The Court erred in overruling the defendant's motion for a new trial.

## ARGUMENT.

### I.

The Court erred in allowing the witness, Hunter to testify and in overruling the objections of the defendant on the ground that said Hunter had been

convicted of a felony and in accepting the telegram as evidence that said witness had been pardoned and restored to citizenship. Tr. pp. 15 and 16.

Fourth As. of Error.

It will be observed that at the trial two things were conceded: first, that the witness, Hunter, had been convicted in said court of a felony, and judgment had been entered against him in the month of February, 1914, thus making him incompetent to testify; second, that to remove the objection of his conviction a telegram was offered by the Government purporting to show that the said witness, Hunter, had been pardoned by the President, and the court being satisfied with the evidence offered over the defendant's objections allowed the witness to testify.

The competency of one convicted of a felony to testify is only restored by full and complete pardon.

Boyd *vs.* U. S., 142 U. S. 450.

Logan *vs.* U. S., 144 U. S. 303.

U. S. *vs.* Hughes, 175 Fed. 238.

Yarborough *vs.* State, 41 Ala. 405.

People *vs.* Bowen, 43 Cal. 439.

Id. 13 Am. R. 148.

Singleton *vs.* State (Fla.), 34 L. R. A. 251.

Thompson *vs.* U. S., 202 Fed. 401.

Id. 120 C. C. A. 575.

Id. With extensive note, 47 L. R. A. N. S. 206.

Osborne *vs.* U. S., 91 U. S. 474; 95 U. S. 153.

A limited pardon does not restore the competency of a witness convicted of a felony.



*State vs. Timmons*, 2 Hawt. (Del.) 259.  
*Perkins vs. Stevens*, 24 Pick. 277.  
*Carr vs. State*, 19 Tex. App. 463.  
*Id.* 53 Am. Rep. 395.

The pardon must be proved by the production of the charter of pardon under the Great Seal.

1 Wig. on Ev., Sec. 523, Sub. 2.  
*U. S. vs. Jones*, 2 Wheeler C. C. 451.

While the disability now under discussion may be removed either by the granting of a pardon or by the reversal of the judgment, yet the proof of such pardon or reversal *must* be by the proper documentary evidence under the general rule that the best evidence must be produced.

Jones on Evidence, §718.

"It would follow that if a judgment appears to have been rendered the party offering the witness must show that it has been reversed or the offence pardoned."

1 Wig. on Ev. Sec. 521. Note citing.  
*State vs. Howard*, 19 Kans., 507, 509.  
*State vs. Clark*, 60 Kans., 450; 56  
Pac. 767.

When Hunter was produced as a witness he stood a convicted felon in said court and as appeared by the record of the court then produced. It seemed to be admitted by the prosecution as also by the court, that the witness had been legally convicted and that such a judgment stood against him in that same court. No showing of any kind was made that the pardon granted Hunter was full and complete, nor what the nature or the effect of the same

might be. A telegram was produced by the district attorney and the statement made by him that the telegram was from the Department of Justice and that the President had pardoned the witness Hunter and the Court read the telegram. (Tr. p. 16.)

In the case of *Singleton vs. State of Florida*, 34 L. R. A. 251, the state introduced one Howard Bishop, who had been convicted of a felony, as a witness and to testify to material and damaging facts against the accused. In the language of that court:

“It is not deemed necessary to set out the testimony of the witness as there can be no doubt that it bore directly on defendant’s guilt, was calculated to influence the jury and if improperly admitted was harmful and cannot be considered otherwise than as reversible error.”

“BEST EVIDENCE,” “PRODUCTION.”

The third assignment of error (Tr. p. 101) is as follows:

3. The Court erred in allowing the witness, Andrew Gilbeau, to testify relative to the kind of bottles which he picked up and the particular labels upon the same, and this without requiring the said witness to produce the said bottles and labels or account for them.

In the consideration thereof we will quote a part of the testimony of the witness, Gilbeau, prior and leading to the objection then made. (Tr. pp. 40-41):

“When I was going that road I saw them drinking out of bottles. When we came back we got a number of bottles there. This was after we came back. Liquor, that is whiskey, had been in the bottles. I could tell by smelling of the bottles. These we picked up right alongside of the track, right where I seen that they were breaking the bottles. It was a pint bottle and a big bottle. I picked up parts of them and could tell there was labels on them. I picked up one bottle.”

*By Mr. Besancon:* We object to the witness testifying to the labels on the bottle. I think the witness said that it looked like these pieces. The witness is not able to identify the bottle that he said he picked up.

*By the Court:* He can testify with reference to them, and you can cross-examine with reference to it. They are not bound to produce them. The objection is overruled.

(Exception noted by the defendant.)

The witness then proceeded to testify as follows:

“As to the kind of bottle, it was one of those pint bottles: it was a big bottle, a flask, and it had a label on. The label had never been broken off the bottle. I didn’t notice what make it was. I know it was a whiskey bottle and that whiskey was written on the label.”

By a fair construction of the above testimony it will be seen that although the statements of the witness are somewhat conflicting, still, as a whole, he testified as to having picked up one bottle and that he read the label on the bottle and that there was writing on the label and from such writing he determined or assisted in determining the contents of the bottle. The testimony

also shows that the bottle was in the witness' possession, at least after he picked it up. Nothing appears as to where it may have been at the time of the trial, and by the ruling of the Court the prosecution was excused from producing the bottle and the label and giving any reason for its non-production.

The plaintiff in error contends that the label was a writing and the best evidence of its contents and that it should have been produced or accounted for, and that it was error to allow the witness to testify as to the words or contents of the writing on the label without producing it or accounting for it.

This will be treated under the "Best Evidence" rule, and we know of no authority that has treated this question more extensively than Wigmore on Evidence in Vol. II., beginning at §1171. In §1175 of the same volume we find that the rule prefers the thing itself to any evidence about the thing.

At §1178 of the same volume we quote the following:

"The rule may be stated, for convenience in examining its details and distinctions, in the following parts: (a) in proving a writing, (b) production must be made, (c) unless it is not feasible, (d) of the writing itself, (e) whenever the purpose is to establish its terms."

In the case at bar the label was unquestionably a "writing." In II. Wig. §1183 and under the



above subdivision "a" we find the definition and rule as to what is considered documents or writings, and we quote such section here in full:

"Sec. 1183. RULE APPLICABLE TO ALL KINDS OF WRITINGS. When the thing in question comes strictly within the class commonly termed 'documents' or 'writings,' i. e. things of paper or parchment employed solely as a material for bearing words written or printed in the form of complete clauses or sentences expressing connected thought, there is no further distinction to be made. The rule is applicable to all kinds of writings. The original doctrine of proffer affected only records and instruments under seal, and applied in civil cases only; but by a gradual development, already noticed (ante, §1177), the rule requiring production in evidence came to be settled, by the 1700s, as including in its scope any and every kind of document, from a record or a deed to a letter or a memorandum, and as applicable equally in criminal and in civil cases."

Under "b", "Production", we quote a part of §1186:

"The rule is that production *must* be made; it says nothing, in itself, as to whether production *may* be made."

Under subdivision "c" *id.* Vol. §1192, we quote such section:

"§1192. General Principle; Unavailability of the Original; Proof to the Judge. (1) The essential principle of preferred evidence is that it is to be procured and offered if it can be had (ante, §1172). That thought dominates both the present rule preferring production of the document itself and the ensuing class of rules preferring one kind of

witness to another kind (post, §1286). The thought is here not that a certain kind of evidence is absolutely necessary, but that a certain kind is to be used if it is available. If it is not available, then it is not insisted upon."

Under subdivision "d" relative to the production of the writing itself, beginning the same volume §1231, we find a comprehensive discourse on what must be produced.

Under subdivision "e", "Whenever the purpose is to establish its terms," beginning at §1242 of the same volume, we find this subject fully and elaborately discussed.

Our contention is that nowhere in the rules of evidence have we found any authority, under circumstances such as arose in this case, that would allow a witness to state that a writing came into his possession and over objection be allowed to testify as to the contents of such writing and as to the words and figures, etc., contained upon the same without producing the original or accounting for it in some satisfactory manner that would allow secondary evidence of its contents.

#### WAIVER.

#### IV.

For the reasons given in Part IV of the statement of the case as contained in this brief no argument is advanced on the fourth assignment of error.

## IMPEACHMENT.

### V.

The testimony and objections relating to the witness Harry Pritchett is found at Tr. pp. 80, 81, also in Part V of the preceding statement of the case and forms the basis of the fifth assignment of error. The testimony and objections will not be repeated here.

We particularly call attention to the objections of the then defendant on the ground that the question asked such witness was not a proper impeaching question and the ruling of the court conceding this position and stating that the testimony might serve other purposes and the further statement of the court, "You can always contradict the defendant on material matters."

It is clear from the testimony given by the witness Harry Pritchett that the prosecution then desired to bring forth a new line of testimony against the defendant. It could not have been to contradict the defendant on material matters. We cannot find in the record that the defendant had testified that he did have or did not have liquor at that particular hand game. The question asked of the witness was big and broad enough to allow such witness to testify to entirely new facts which might be the basis of an entirely new charge or offence against the defendant.

"To contradict the defendant on material matters he must have testified to such matters."

Vo. II Wig. on Ev., §1000, *et seq.*

It certainly was not proper to attempt in rebuttal to charge the defendant with another and distinct offence and by this process of elimination we cannot see any other purpose or object for this testimony than an attempt to impeach the defendant, showing that regardless of his former declarations and statements that he, the defendant, did have liquor on or about him at a particular time and place and if this was the purpose then we fail to find in any examination of this defendant any testimony of his that would justify such an attempt to impeach him.

It seems the prosecuting attorney did ask the defendant whether he knew Harry Pritchett, Lawrence's brother, and he answered that he did and had seen him a few times (Tr. p. 56). This, of course, did not constitute a proper and necessary preliminary warning that should have been given to the defendant before inquiring of the witness Harry Pritchett. (Vo. II Wig. on Ev. §1025.)

For these reasons we believe that the objection to the testimony to be given by such witness Harry Pritchett should have been sustained, and as will appear by the record (Tr. p. 81) such witness gave very damaging testimony against the defendant such as would tend to prejudice him in the minds of the jurors.



## MISCONDUCT.

### VI.

The plaintiff in error again calls the court's attention to his sixth assignment of error (Tr. p. 102) and the testimony relative to the same (Tr. pp. 48-53 and 86), all of which testimony, the objections to the reading of the part thereof by the prosecuting attorney and the exceptions to the ruling of the court, are fully set forth in Part VI of the statement of the case in this brief.

We have examined the transcript notes of the court stenographer and the original bill of exceptions, as well as the transcript in this case, and do not find therefrom any mention as to whether such part of the testimony was read by the United States attorney in his opening or closing remarks to the jury. However, the fact is that this was done in the closing argument by the attorney, and we do not think the government will contend otherwise, and being in his closing argument there was no possible chance for the attorneys for the then defendant to refute the same in argument.

We contend that in thus placing before the jury a part of the testimony of the defendant which part contained an admission of guilt while if all of the testimony had been read the exact opposite would have been shown, constituted misconduct on the part of the prosecuting attorney, and further, that the ruling of the court at such time precluded any further objection and any request to

have the court caution the jury to disregard such alleged misconduct of the prosecution.

The reading of a part of the testimony showing one meaning although it is a correct reading of this part, still constitutes a misstatement of the testimony, and here the prosecution by its conduct compelled the defendant to be a witness against himself and the jury were told that the defendant had admitted his guilt when, as a matter of fact, no such inference nor conclusion could be drawn from all of the testimony. (Art. V. Amd. to U. S. Constitution.)

“A prosecutor in a criminal trial has no right in arguing a cause, to state as a fact any matter not borne out by the testimony.”

*Palin v. State* (Neb.), 57 NW. 746.

“A defendant claiming that the prosecutor is not correctly quoting his testimony to the jury should request that all of the testimony be read and the court should request this to be done.”

*Stuckey vs. Fritsche* (Wis.), 46 N. W. 60.

In the case at bar it will be noticed that the court left this as a matter optional with the prosecution as to how much or what part of the testimony he might use or read. This certainly was error as it was a matter within the power and control of the court.

We believe our objection was timely and well taken.

(Abbotts Cr. Tr. Brief 601.)

“It is error to allow the prosecuting attorney, against defendant’s objections, to argue from facts not in evidence.”

Abbotts Cr. Tr. Brief 606.

People *v.* Mitchell, 62 Cal. 411.

“When the prosecuting officer has indulged in argument not supported by the record or makes use of unfair or prejudicial statements, either in argument or the examination of witnesses, or at any other time in the presence of the jury, the defense should at once object, and thereupon it becomes the duty of the court to instruct the jury not to consider what the prosecuting officer has said and the remarks or argument or statement should also be withdrawn by the prosecuting officer.”

Atwells Fed. Cr. Law §22a. Citing:

Higgins *vs.* U. S., 185 Fed. 710.

Donaldson *vs.* U. S., 208 Fed. 4.

Steward *vs.* U. S., 211 Fed. 41.

Fish *vs.* U. S., 215 Fed. 545.

L. R. A. 1915-A 810.

And others.

“The situation made by the prosecuting attorney was under the circumstances highly improper and not having been withdrawn, and the objections to it being overruled by the court it tended to prejudice the rights of the accused to a fair and impartial trial.”

Williams *v.* U. S., 168 U. S. 382.

See also:

Hill *vs.* U. S., 150 U. S. 76.

Lowdon *vs.* U. S., 149 Fed. 677; 46

L. R. A. 641-653.

“The fact that the district attorney states some portion of the evidence erroneously or makes exaggerated statements as to its strength is not error unless it is clear to

the court that the accused was prejudiced thereby."

12 Cyc. 575 and cases cited.

However, it certainly cannot be contended that the intent, purpose and effect of the prosecution reading such part of the defendant's testimony did prejudice the defendant and, in fact, place him before the jury as a confessed and admitted criminal.

We find that this court seriously considered the question of the misconduct of the prosecuting attorney in the Diggs case, 220 Fed. 556 and in such decision cited:

*People v. Shears* (Cal.), 65 Pac. 295.

*People v. Babcock* (Cal.), 117 Pac. 594.

*Dunlop vs. U. S.*, 165 U. S. 486.

*Chadwick vs. U. S.*, 141 Fed. 225-245.

We quote from Mr. Justice Lurton in the Chadwick case above cited:

"But when facts not in evidence are stated to the jury, or arguments advanced plainly not justified by the evidence, and calculated to arouse prejudices incompatible with even-handed justice or an orderly course of procedure, it is the right and privilege of the counsel for the accused to object and ask the interference of the court and to except when the court denies the appeal. But to entitle the accused to a reversal when objection is made and the language not withdrawn it must appear that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused."

Citing the Dunlop case, and also:

*Kellogg vs. U. S.*, 103 Fed. 200, 43

C. C. A. 179.



## INSTRUCTIONS—ACCOMPLICES.

### VII, VIII, IX AND XI.

This part of the brief has reference to the instructions requested by the defendant, being numbers 1, 2 and 3 (Tr. pp. 84, 85) set forth fully in the statement of the case in this brief under paragraphs VII, VIII and IX and being under the same numbers in the assignments of error, and also to the instructions given by the court relative to the witness Lawrence Pritchett found at Tr. p. 93, also the 11th assignment of error (Tr. p. 103) and Part XI of the statement of the case in this brief. The failure to give the first three instructions above noted and the giving of the fourth constituting the error complained of.

It will be noted in this case that the defendant was found guilty on Count Three of the indictment, said Count Three being set forth at Tr. pp. 13 and 14, being based on what took place on the 5th day of October, 1915, and all the facts connected therewith and alleged to have occurred on the trip of the defendant and others from the city of Missoula to the Flathead Indian reservation.

From a consideration of the entire testimony in this case we believe it will be noted that the prosecution relied almost wholly upon the testimony of the two witnesses Charlie Hunter and Lawrence Pritchett, and without such testimony no conviction would have resulted nor could be sustained. It is even difficult to find anything corroborating

the testimony of those two witnesses; so we have almost concluded that the testimony of such witnesses convicted the defendant.

As to the witness Hunter, the record of a former conviction stood against him to affect his credibility and the court commented on this in his instructions (Tr. p. 89) and also in the same instruction (Tr. p. 92) the court commented on the fact of Hunter taking part in the occurrences and that he might be an accomplice, and although not declaring him such still we believe the jury could infer from the remarks of the court that Hunter was placed in such position and that his testimony should be weighed accordingly. So the failure to give the instructions above noted and the giving of the instruction of the court are to be considered in reference to the witness Lawrence Pritchett.

For convenience we will again quote the instructions requested and refused by the court, being numbered by the then defendant 1, 2 and 3, and in the following language:

1. An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

2. You are instructed as a matter of law, that if you believe from the evidence that the witness Lawrence Pritchett actually committed or assisted or participated in the commission of the offence

charged in the indictment, then he is an accomplice.

3. The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you. (Tr. pp. 84, 85.)

And we again quote the instruction given by the court with reference to the witness Lawrence Pritchett:

“As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice.” (Tr. p. 93.)

We believe the definition of an accomplice is well stated in 12 Cyc. 445, in the following language:

“The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offence for which the accused is being tried.” Citing:

People *vs.* Collum, 122 Cal. 186; 54 Pac. 589.

State *vs.* Jones, 115 Iowa 113; 88 N.W. 196.

Territory *vs.* Baker, 4 N. M. 236; 13 Pac. 30.

The above definition being cited by this court in  
*Diggs vs. U. S.* 220 Fed. 545.

“Whether a witness is an accomplice is a question of fact to be determined by the jury under instruction from the court as to the law.”

12 Cyc 446, citing 12 Cyc 449j, in the following language:

“The question whether the participation of the witness in the crime makes him an accomplice is one of fact for the jury to determine from all the circumstances, both under instructions from the court as to the necessity for the criminal intent and other elements which are necessary to constitute one an accomplice.”

Again citing:

*People vs. Compton*, 123 Cal. 403;  
56 Pac. 44.

*People vs. Curlee*, 53 Cal. 604.

*State vs. Spotted Hawk*, 22 Mont. 33;  
55 Pac. 1026.

The above definition is accepted and approved  
by the following decisions:

*Stone vs. State*, 118 Ga. 705; 45 SE.  
630.

*State vs. Duff*, 144 Ia. 142; 122 N.  
W. 829.

*State vs. Gordon*, 105 Minn. 217; 117  
N. W. 483.

*State vs. Douglas*, 26 Nev. 196; 65  
Pac. 802.

*State vs. Durnam*, 73 Minn. 165; 75  
N. W. 1127.

*Dunn vs. People*, 29 N. Y. 523; 86  
Am. Dec. 319.

*Sanches vs. State*, 48 Tex. Crim. 591;  
90 S. W. 641.

Other definitions of accomplice fol-  
lowing:



“An accomplice is one who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime.” Jones on Ev. §768.

“To constitute an accomplice he must have participated in the criminal intent.” Abbott’s Crim. Tr. Brief, 622.

“According to some definitions the word ‘accomplice’ includes all persons who participated in the commission of the crime, whether they do so as principals or aiders and abettors before the fact.”

Ledering *vs.* Com. 132 Ky. 666; 117 S.W. 253; 136 A. S. R. 192.

Also Note 2, 138 A. S. R. 274.

State *vs.* Duff, 122 N. W. 829.

See also 21 L. R. A., N. S. 878.

People *vs.* Coffey, 161 Cal. 433; 119 Pac. 901.

Cross *vs.* People, 47 Ill., 152; 95 Am. Dec. 474.

McClain Crim. Law, §§195-203.

“Whether or not a witness is an accomplice is, generally speaking, a question of fact for the jury.”

People *vs.* Kraker, 72 Cal. 459; 14 Pac. 196.

State *vs.* Keller, 8 N. D. 563; 80 N. W. 476.

Driggers *vs.* U. S., 21 Okl. 60; 95 Pac. 612.

Williams *vs.* State, 33 Tex. Crim. 128; 25 S. W. 629.

Porath *vs.* State, 90 Wis. 527; 63 N. W. 1061.

Tested by the above rules and weighed accordingly the question arises as to whether or not Lawrence Pritchett was an accomplice. We unquestionably believe that he was an accomplice, and

was proven so by nearly all of the witnesses who testified in this case. We wish to call the court's attention to some of this testimony and will briefly comment on it with the transcript page where found:

He was with Hunter, the defendant, and others at Missoula before they started on the trip, and went with Hunter to secure some whiskey at the Frog Pond (Tr. p. 17). He got into the car with the others and when Hunter says "The two pints we got at the Montana Bar" Lawrence Pritchett was with him. Lawrence sat in the hind seat with Hunter (Tr. p. 18). They were all pretty near drunk, Lawrence and the others. Lawrence and the others had drinks at Couture's place (Tr. p. 19). Again, Lawrence went with Hunter to the Frog Pond and with him to the Montana Bar; at both places liquor was secured (Tr. p. 22). Somebody got out and picked up a bottle a few miles out of Missoula (Tr. p. 24). The witness Stephens thinks it was Pritchett that got out of the car where he got something and brought it back with him (Tr. p. 28). Again, from Pritchett's own testimony, he says when they picked up a quart bottle along the road it had a paper around it and they took the paper off and put it under the back seat (Tr. p. 31). Again, he and the others had a drink at Couture's place (Tr. p. 32). Again, on another trip on the reservation, Lawrence sat in the back seat of the car with others and the bottle

was passed from there (Tr. p. 37). Again, at Blue-eyed Mary's place on the reservation Pritchett took a bottle and passed it around (Tr. p. 39). Again, Lawrence went out in the brush and got a bottle and passed it around (Tr. p. 46). At the hand game Lawrence brought some over and seemed to have a cache in a hay stack somewhere and furnished the same to whoever wanted it (Tr. p. 47). Again, Lawrence asked to stop the car in Missoula and four or five miles out of town again, asked to stop, where he went out to a fence. Later he pulled out a bottle and passed it around (Tr. p. 50). Again, he invited the party over to Blue-eyed Mary's place, where he, Lawrence, had a quart or a pint of whiskey (Tr. p. 54). Lawrence asked them to stop at the Montana Bar (Tr. p. 55). After they got out of town Lawrence passed a bottle around (Tr. p. 55). He asked them to stop a short distance out of town where he got out and went over to a fence for something (Tr. p. 55). Lawrence said he had a cache and went and took it out himself and passed the bottle around (Tr. p. 56). Lawrence had some whiskey at Blue-eyed Mary's place (Tr. p. 57). Lawrence and Hunter got out of the car and went up the street, where they were found in a saloon drinking at the bar, and that is the saloon where the liquor was obtained (Tr. p. 61). About four miles out of Missoula Lawrence jumped out and got a bottle that had been left there the day before (Tr. p. 62). This bottle of

whiskey had been cached there by members of the same party the day before (Tr. p. 66). Another witness saw Lawrence hand a bottle to Joe on the reservation, having obtained it around a stack (Tr. p. 74). Lawrence had some liquor the day at the hand game (Tr. p. 84). Together with all of the other testimony in the entire transcript which connects Lawrence Pritchett with the obtaining, handling and giving of whiskey and liquor when off the reservation and on the reservation and when in company with the defendant and others.

We are not unmindful of the rule followed in criminal trials in the federal court to the effect that a trial court is not required to caution juries not accepting the evidence of an accomplice without material corroboration, etc., although this seems to be the rule in practically every state court. To quote Judge Archibald in *Richardson vs. U. S.*, 181 Fed. 1:

“No doubt there is a well established practice, sanctioned by long practice and judicial approbation, to caution jurors about accepting the evidence of an accomplice without material corroboration, coming, as it does, from a polluted source, but this is as far as the matter goes.”

In the above action Judge Archibald cited:

*Holmgren vs. U. S.*, 272 U. S. 509.  
Id. 30 Sup. Ct. 588.

These cases are also cited by the decisions in this court:



*Lung vs. U. S.*, 218 Fed. 817.

*Diggs vs. U. S.*, 220 Fed. 545.

“So manifest is the danger of convicting a man on evidence from a source confessedly corrupt and delivered by the witness to shield himself from merited punishment that the judges, while explaining to the jurors their right to convict, by way of caution advise them not to return a verdict of guilty unless it is corroborated by evidence from a purer source; yet they are not as of law required to give this advice.”

Atwell's Fed. Crim. Law §42b. Citing:

Bishop New Crim. Proc. 2nd Vol., §1169.

It should not be overlooked in this case that the witness Lawrence Pritchett was impeached for truth and veracity by the witnesses Archie Grant (Tr. p. 78), Mrs. Couture (Tr. p. 77) and Frank Kirkpatrick (Tr. p. 78). And this, in connection with his participation in the criminal acts, did not make him a pure and credible witness.

We believe the instructions offered should all have been given, and especially 2, relative to the witness Pritchett, and that it was error on the part of the court not to give these instructions. However, for the court to instruct the jury that Lawrence Pritchett was not an accomplice in the opinion of the court and to cite to the jury one instance of Pritchett standing by and taking no part when the liquor was passed in substantiation thereof placed this witness before the jury as not only not an accomplice but as a witness entitled

to full credit; in other words, a witness who is pure and not charged with any wrongful participation in the offence and entitled to full credit as such. In doing this we believe the court committed reversible error, for, as already stated, the evidence to support a conviction of the defendant on the Third Count rested upon the testimony of Hunter and Pritchett and the court could not single out one of these witnesses and absolve him of all wrongdoing without serious prejudice to the defendant.

Lawrence Pritchett certainly could have been indicted on all three of the counts charged against the defendant and could have been convicted on each and all of these counts. Pritchett and Hunter were the leaders and instigators during practically all of the occurrences that led up to these charges and both should properly have been charged with the crime, whether the then defendant was so charged or not.

#### KNOWLEDGE—INSTRUCTION.

##### X.

We wish to briefly call attention to the defendant's requested instruction No. 4 (Tr. p. 85) set forth in full in Part X of the statement of the case in this brief. This requested instruction was also refused by the court. We believe that the instruction was proper. Certainly the defendant should not and could not have been properly convicted on the third count unless he knew or as a reasonable

person should have known that liquor was being conveyed in his machine and in that way introduced into the Flathead Indian reservation.

It will be noted that the court, in its instructions to the jury (Tr. p. 93), did instruct on this phase of the case. However, in the instruction to the jury the court laid particular stress on the fact that if the liquor was Hunter's and the defendant knew nothing about it he, the defendant, would be guiltless, and every time the court approached this subject in the instructions it was to single out Hunter and the fact that Hunter might have placed it or had liquor in the automobile. Our contention is that the instructions as requested which referred to all persons riding in the automobile and whether or not they had any liquor, should have been given to the jury or the jury should have been charged substantially to the same effect.

Although there is plenty of testimony to the effect that Hunter placed liquor in the machine and had it there, there is likewise a large amount of testimony that Lawrence Pritchett did the same, and there is also testimony that Charlie Stephens and other passengers had some liquor. The charge to the jury was not comprehensive enough to include all of the persons riding in the machine and for that reason was erroneous and left with the jury the impression that the defendant was guilty, except in the one instance, and that

would be when Hunter had the liquor and the defendant had no knowledge of this fact.

### CONCLUSION.

### XII, XIII, XIV, XV.

We therefore respectfully submit that the defendant was not given a fair and impartial trial to which he was entitled under the law and the rules of evidence. That all of the evidence in the entire case was not sufficient to warrant the jury in finding him guilty. That his motion in arrest of judgment should have been sustained. That no sentence should have been passed upon him and no judgment entered against him, and when this was done that his motion for new trial should have been sustained. For the manifest errors of the court below and all as set forth in this brief the conviction and judgment against the plaintiff in error should be set aside and this case should in all things be reversed.

ALBERT BESANCON,

JOHN P. SWEE,

Attorneys for Plaintiff in Error.

Dated: January 6th, 1917.



IN THE  
United States Circuit Court of Appeals  
FOR THE  
NINTH CIRCUIT.

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JOE PABLO,  
Plaintiff in Error, )  
VS  
UNITED STATES OF AMERICA, )  
Defendant in Error.

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**APPELLEE'S BRIEF.**

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B. K. WHEELER,  
United States Attorney,  
District of Montana.

HOMER G. MURPHY,  
Assistant U. S. Attorney,  
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JAMES H. BALDWIN,  
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Solicitors for Appellee.

**Filed**

MAY 8 - 1917

**F. D. Monckton**

**Clerk**



IN THE  
United States Circuit Court of Appeals  
FOR THE  
NINTH CIRCUIT.

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JOE PABLO,

Plaintiff in Error,

VS

UNITED STATES OF AMERICA,

Defendant in Error.

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**Brief of Defendant in Error.**

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In the above entitled cause we have been served with the printed brief of the plaintiff in error, and upon such brief we desire to base the following motion:

Comes now the United States of America, defendant in error, in the above entitled cause, and moves this Honorable Court to dismiss the appeal of the above named plaintiff in error for the reason and upon the ground that the brief heretofore served and filed herein by the plaintiff in error does not con-

tain a specification of the errors relied upon as required by Subdivision B of Rule 24 of the rules of the above entitled court, adopted November 1, 1894, as amended June 2, 1916, or specification of errors in proper form or manner.

WHEREFORE defendant in error prays that the appeal of plaintiff in error herein be dismissed.

### ARGUMENT ON MOTION

In the brief of plaintiff in error served and filed, which is defective by reason of a lack of specification of errors as required by the rules of this court, there is a mass of disconnected paragraphs which in themselves do not set out the testimony objected to and the objections themselves, which makes it difficult, indeed, for a logical reply to be framed by the defendant in error. We submit that the court should grant the motion to dismiss this appeal.

### ARGUMENT ON MERITS.

In the event this court should not grant the foregoing motion, we desire to observe the following:

The statement of the case contained in the purported brief of plaintiff in error herein is erroneous and most misleading, for, although it is true, as appears from the indictment in the record (Tr. pp. 2-4) that the plaintiff in error was indicted on three separate charges contained in three separate counts in said indictment, nevertheless the jury by its verdict (Tr. p. 8) acquitted the plaintiff in error as to counts one and two of the indictment and found him



guilty in manner and form as charged in count three thereof. To this extent we wish to correct the statement of the case in paragraph 1, page 3 of the brief of plaintiff in error.

It is well to bear in mind in this case that many of the labored arguments of plaintiff in error are made in an effort to show that reversible error was committed in the trial of the case, but we submit that if any error was committed by the trial court relating to evidence introduced for the purpose of sustaining the charges contained in counts one and two of the indictment or by instructions to the jury properly excepted as to those counts, that inasmuch as the government had made out a case that was warranted to go to the jury, such error cannot affect the verdict of the jury as to count three, which is the sole one upon which Pablo was convicted (Tr. p. 8).

See: *Diggs v. U. S.*, 220 Fed. 545 at page 553;  
*Cook vs. U. S.*, 159 Fed. 919.

This is such a self-evident proposition that we do not burden the court with useless citation of authorities.

#### THE TESTIMONY OF CHARLES HUNTER.

The telegraphic communication of the fact that the President had pardoned Charles Hunter was sufficient to apprise the court of an executive act of the President, and as the trial judge said when such act was called to the attention of the court he could

take judicial notice of it, and counsel for plaintiff in error himself stated he could not question the telegram (Tr. p. 15, lines 31-32) Indeed, the court stated if an error had occurred and no pardon had been actually granted it could be called to the attention of the court on a motion to set aside the verdict (Tr. p. 16, lines 3-16). No such motion was ever made and, indeed, no attempt could have been made to show the pardon was not granted as the court was informed had been done, for the reason that the pardon was duly received through the mails in due time and counsel himself for plaintiff in error so advised. It was never imagined that an attempt would ever be made to secure a reversal of this case on any such ground, or an interpolation of such fact would have been made in the record such as plaintiff in error was permitted to do on page 16, lines 28-32.

Of course, the evidence of Hunter was not to the liking of plaintiff in error and we do not believe defendants as a general rule find any evidence of the prosecution's witnesses that is not damaging to the defense.

We have no fault to find with the authorities cited on page 20 of the brief of plaintiff in error insofar as they hold that the pardon should be full and complete. No question as to the completeness of pardon appears in the record in the case at bar, hence we can dismiss it from our consideration. There is no such thing as a charter of pardon under the great seal in the United States as mentioned

in lines 5 and 6, on page 21 of the brief of plaintiff in error, and that being the case his citations to the effect that one under the great seal must be produced is not in point. Plaintiff in error is merely trying to magnify an immaterial matter into something enormous for the purpose of securing a reversal on a technical ground, if indeed it should be thought that the judicial notice of the President's executive act was improper.

We are unable to see any relevancy of Singleton vs States, 35 L. R. A. 251 to the question now under consideration. We have under consideration the question as to whether or not a telegram advising that a full and complete pardon had been granted by President Wilson was sufficient evidence of the fact that Hunter had been fully pardoned. The telegram itself does not appear in the record and it is to be presumed that it was sufficient to apprise the court of the fact that a full and complete pardon had been granted. The last four lines on page 16 of the transcript are merely a gratuitous statement by counsel of plaintiff in error and are not the words of the telegram. We contend no error was committed by admitting Hunter's testimony as counsel do not contend that Hunter was not pardoned but merely that we did not produce the original pardon, which contention if sustained as reversible error would be to thwart justice by the most technical of technical reasons. The testimony of Hunter finds abundant corroboration throughout the record, even the testimony of plaintiff in error corroborates part

of that given by Hunter.

Hunter testified: He was in Missoula and left with Pablo, Hull, Pritchett, and Stevens in an automobile for Ronan on the Flathead Indian Reservation; that they stopped at the Montana Bar and he and Pritchett got out and went in to get liquor, which they did; the entire party started on the trip to Ronan, had drinks on the way; stopped a few miles out and got a bottle which was cached along the road by a fence; Pablo drank as did the rest except Hull; they proceeded to the reservation stopping at Johnny Matts, Coutures, Pritchett's homes, Pablo's house and then went on to Ronan (Tr. pp. 15-26). At least as to this portion of Hunter's testimony corroboration is to be found in the testimony of the following witnesses: Charles Stevens (Tr. pp. 27-30) as to the trip as far as Matt's; Lawrence Pritchett (Tr. pp. 30-32; 33-34) as to the trip as far as Pritchett's house; Joe Pablo's (testimony of plaintiff in error) (Tr. pp. 49, 50, 51, down to cross examination on page 52; from line 9 page 54 down to line 15 on page 56). Pablo's testimony, of course, contains many denials of various things Hunter testified to but in the main the passages referred to show Hunter was truthfully testifying.

The witness Phil Hull, who was the driver of the car, corroborates a great deal of what Hunter testified to, sufficiently at least to show Hunter was truthful (Tr. pp. 61-68).

Gibeau (Tr. pp. 38-42); Ramsey (Tr. pp. 43-44); Jaeck (Tr. pp. 68-70), and Thompson (Tr. pp. 70-



72) also corroborate Hunter as to what happened between St. Ignatius and Ronan.

So in the last analysis of Hunter's testimony we find so many testifying to practically everything he did that if by any chance it is thought error occurred by permitting him to testify under the circumstances, still the record contains evidence to the same effect to such an extent that no error sufficient or worthy of predicated a reversal thereon exists.

### BEST EVIDENCE-PRODUCTION.

The third assignment of error is one based on an objection interposed by counsel, but neither the transcript of the record, page 41, or the specification of errors No. 3 quotes the question asked the witness and the objection interposed does not cover the point to which all arguments under this head is directed. The argument is entirely directed to the fact the best evidence as to what was on the labels was the labels themselves. The objection was "we object to the witness testifying to the labels on the bottles." There was no objection comprehensive enough to include the argument that plaintiff in error relies upon. The testimony merely was a description of the bottle itself and a statement that it had a label on it and on the label was the word "whiskey." We submit that no proper objection having been made that the admission of the testimony in itself is harmless.

The most that can be said of Gilbeau is that he

stated the label on the broken bottle had the word "whiskey" upon it. This far from a complete statement by him as to the contents of the label. It is at most a mere descriptive expression. We find by referring to page 44 of the transcript, lines 22-32, and page 45, lines 1 to 5, that the witness Ramsey testified that he got in the automobile at Ronan with Gilbeau and they went down to the place that Gilbeau pointed out as the point on the road where the Pablo automobile left the main road and took to the woods; that he and Gilbeau went around that road, looked for some broken bottles and he picked up some there at that time; Ramsey further stated that he could not tell what had been in the bottles except from the paper and the labels and that he knew the labels that were on the bottles; that the main label was "Joel B. Frazer Whiskey" and that there was a government stamp over the top of the bottle which said 100% proof  $1\frac{1}{5}$  gallon. This complete testimony on the part of Ramsey as to what was upon the labels went in without any objection on the part of plaintiff in error and being corroborative, indeed, amplification of Gilbeau's testimony eliminated any possible chance of error by the trial court in permitting Gilbeau to testify as he did. Gilbeau and Ramsey are corroborated as to picking up the bottles by the testimony of Yaeck (Tr. p. 69, lines 26-31), and Thompson (Tr. p. 71, lines 22-24). Yaeck and Thompson were both witnesses for the plaintiff in error at the trial.

All of the citations of authorities contained in the

brief of plaintiff in error under this heading do not apply as the objection is not comprehensive enough to take in the scope of the argument and the points now relied upon by plaintiff in error as to this question.

### TESTIMONY OF HARRY PRITCHETT.

The testimony urged to be error in subdivision V of the brief of plaintiff in error relates entirely to the testimony given by Pritchett as to the offenses charged in counts one and two of the indictment. As heretofore observed, plaintiff in error was acquitted of those two charges and the testimony so given was in no way related to the charge for which he was convicted in count three. Having no bearing on count three, it cannot be reversible error for the reason that the jury could not have considered it in any sense because the charges in counts one and two were alleged to have occurred on the 6th and 5th days of September, 1915, and the charge in count three is alleged to have occurred on October 5, 1915, or thirty days after the first two, so it could not have been confusing or misleading to the jury. Indeed, the objection to this question was based on the fact that the witness had immediately preceding the question objected, stated "I did not have any conversation with him at that time to amount to anything; I saw him there." (Tr. p. 80, lines 28-30). The judge held that it was not for the witness to pass upon the fact as to whether Pablo had said something that amounted to anything. The United

States was trying to find out and did find out what the defendant said and the propriety of allowing witnesses to so testify fully appears by lines 15 et seq., on page 28 of the transcript.

As to the further objection that it was not a proper impeaching question, the court's comment that you can always contradict the defendant on material matter, is correct. Indeed, the objection does not state that there was no ground laid for the impeachment, but held that it was not a proper impeaching question, neither are tenable if both had been made properly. Indeed, this testimony was not concerning a separate offense on the part of plaintiff in error but was directly connected with the happenings on September 5th and 6th, and the hand game then going on at Arlee when and where the offenses charged in the first two counts of the indictment were alleged to have been committed and about which the defendant had testified fully and endeavored to place the guilt of having introduced the whiskey into the Indian Reservation upon this witness, Pritchett. There is no objection that it was not proper testimony in rebuttal.

### MISCONDUCT.

The argument relating to the testimony of Pritchett in the paragraph last preceding as to the matter being one which related to counts one and two applies here also.

In order to assist the court we state that it is to be found at the bottom of page 85 of the transcript and



also on the first half of page 86 thereof. The slightest reading will show by comparison it was that portion of Pablo's testimony relating to the first two counts of the indictment of which he was acquitted. The part Mr. Wheeler read is found on page 48 of the transcript from line 12 to 17, and was a part of the direct examination of Pablo, for which the United States Attorney was in no manner responsible. Many a defendant when a witness will inadvertantly tell the truth, which we believe Pablo did in this instance. Again he might have misunderstood the question. Whichever way it was, was clearly a question for the consideration and determination of the jury and a proper subject for comment during the argument by the United States Attorney. The questions and answers following what Mr. Wheeler read were merely the clever ruse of counsel for the defendant Pablo in an effort to extricate him from a nasty admission which his counsel wished cleared up. The jury was the one to say whether he understood and answered the first question. Judging his testimony as a whole it is entirely probable and most possible that Pablo meant exactly what he said in answer to Mr. Besancon's question, for the emphasis in the question is the last part of it "did you go down to the Chinaman and get a bottle?" as that was one of the vital points as to that count. But as we have heretofore observed the error is harmless as it related to the first and second count.

The citations in the brief of plaintiff in error

under this heading are not in point, as Mr. Wheeler did not state a fact not borne out by the testimony or misquote any testimony; he read in full a portion only, which is entirely proper, and he made no exaggerated claims as to what the testimony showed. It can hardly be claimed that counsel for either side in a case must read an entire transcript of the testimony while arguing. Such a contention would be absurd.

### INSTRUCTIONS — ACCOMPLICES.

The marvelous conclusion of counsel for plaintiff in error that “we have almost concluded that the testimony of such witnesses (Hunter and Pritchett) convicted the defendant” (Tr. p. 34, lines 1-13), clearly shows either a lack of careful study of the record or a desire to mislead this court. We have heretofore under the heading “Testimony of Charles Hunter” made a resume of the main facts wherein Hunter was corroborated, and inasmuch as the same is true as to Pritchett’s testimony we will not repeat the same here.

The first rule of law in connection with accomplices is that under the common law a conviction upon the testimony of an accomplice was permissible, although such testimony was not corroborated. In many states the state laws have changed this rule and require the testimony of an accomplice to be corroborated. In other words the rule of law in many states forbids the conviction of anyone on the uncorroborated testimony of an accomplice. But

under the law of the United States a person charged with a crime may be convicted on the uncorroborated testimony of an accomplice. It is true the courts in some instances have modified this rule by decisions to which we will advert later.

In Wharton's Criminal Evidence (10th Ed.) Sec. 440, p. 922, an accomplice is defined as follows:

“An accomplice is a person who knowingly, and with common intent with the principal offender, unites in the commission of a crime. The cooperation must be real and not merely apparent.”

The definitions of accomplice given by plaintiff in error do not apply in Federal courts as they are all from states where there is a rule different from that in the Federal courts, hence the citations are not in point.

We find the question has often been treated by Federal courts and the rule as to accomplices clearly enunciated.

See

Hanley v. U. S., 123 Fed. 851;

Aheam v. U. S., 158 Fed. 606;

Richardson v. U. S., 181 Fed. 1;

Lung v. U. S., 218 Fed. 817;

Diggs v. U. S., 220 Fed. 545.

We submit that the instruction of the court as to

accomplices found on page 92 and the first four lines of page 93 fully covers the requested instructions numbered 1 and 3 and that being so no error occurred.

Kettenbach v. U. S., 202 Fed 377;

Bennett v. U. S., 227 U. S. 333.

The refusal to give requested instruction No. 3 was not error for the evidence discloses as to count 3 of the indictment that Pritchett was merely a passive onlooker and did not purchase, own or take part in the transportation of the liquor, indeed; he left the automobile before reaching Arlee and neither took with him or claimed any of the liquor as his own but permitted the others to ride off with the liquor which would have been done had he an interest in it. It is significant that plaintiff in error does not cite any Federal cases to support his contention as to this point. The cases cited by him are under state statutes and in no manner control this court.

We submit the question of accomplices was fully covered by the instructions of the court as given and no error occurred in refusing request numbered 3 as Pritchett is not shown by the testimony to come within the definition of an accomplice.

#### KNOWLEDGE—INSTRUCTION.

Requested instruction numbered 4 was properly refused as it was not warranted by the testimony and the court fully covered this phase of the case by



its instructions (Tr. p. 93 line 5 et seq.) The evidence conclusively showed that no one except Hunter and Pablo had any interest in the liquor. Stevens left the car first after having had the drinks en route, then Pritchett got out of the car, and the rest proceeded on the trip to Ronan with the liquor. Stephens and Pritchett certainly had no claim to the liquor or they would not have abandoned it thus if they were introducing it into the Indian country.

In conclusion we repeat that no error occurred on the trial of this case and the judge should be affirmed.

B. K. WHEELER,  
United States Attorney,

HOMER G. MURPHY,  
Assistant U. S. Attorney,

JAMES H. BALDWIN,  
Assistant U. S. Attorney,  
District of Montana.



United States  
Circuit Court of Appeals

For the Ninth Circuit.

7

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Transcript of Record.  
(IN TWO VOLUMES.)

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CHARLES H. MOYER, as Trustee for the Western Federation of Miners, a Voluntary Unincorporated Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado, CHARLES H. MOYER, C. E. MAHONEY and ERNEST MILLS as Members of the Western Federation of Miners, a Voluntary Unincorporated Association of Persons With Its Headquarters in the City and County of Denver, Colorado,

Appellants,

vs.

THE BUTTE MINERS' UNION, a Corporation,  
Appellee.

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VOLUME I.  
(Pages 1 to 320, Inclusive.)

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Upon Appeal from the United States District Court for the  
District of Montana.

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Filed

DEC 6 - 1916





United States  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## **Names and Addresses of Attorneys of Record.**

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Butte, Montana.

Mr. O. N. HILTON, Symes Building, Denver,  
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Mr. E. P. Kelly, Phoenix Building, Butte, Montana.  
Solicitors and of Counsel for Complainants  
and Appellants.

Mr. PETER BREEN, Silver Bow Block, Butte,  
Montana.

Mr. A. C. McDANIEL, Silver Bow Block, Butte,  
Montana.

Solicitors and of Counsel for Defendant and  
Appellee.

*In the District Court of the United States, in and for  
the District of Montana.*

**EQUITY NO. 33.**

CHARLES H. MOYER, as Trustee for the Western  
Federation of Miners, a Voluntary Unincorporated  
Association of Persons With Its Headquarters in the City and County of Denver, State  
of Colorado, CHARLES H. MOYER, C. E.  
MAHONEY and ERNEST MILLS, as Members of the Western Federation of Miners a  
Voluntary Unincorporated Association of Persons With Its Headquarters in the City and  
County of Denver, Colorado,

Plaintiffs,

vs.

THE BUTTE MINERS' UNION, a Corporation,  
Defendant.

BE IT REMEMBERED, That on the 15th day of September, 1915, a Bill of Complaint, was filed herein, which said bill is in the words and figures as follows, to wit: [1\*]

*In the District Court of the United States of America for the District of Montana.*

CHARLES H. MOYER, as Trustee for the Western Federation of Miners, a Voluntary Unincorporated Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado, CHARLES H. MOYER, C. E. MAHONEY, EARNEST MILLS, THOMAS OWEN, J. E. COMMINS, CHARLES POGORELIC, YANCI TERZICH, J. C. WILLIAMS, C. E. BRIGHT, CHARLES DETRICH, WILLIAM BURNS, J. A. HERNDON, THOMAS McMANUS, E. G. LOCK, JAMES HANLEY, W. T. QUINN, PHILLIP RYAN, WILLIAM STANLICK, GUY E. MILLER, RUFUS BLAYLOCK, THOMAS GORMAN, EMANUEL DE MIO, L. S. SEXTON, SAMUEL W. MONROE, WILLIAM DAVIDSON, FRANK PHILLIPS, JAMES ROBERTS, JOSEPH GORMAN, and M. C. LEAKE as Members of the Western Federation of Miners a Voluntary Unincorporated Association of Per-

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\*Page-number appearing at foot of page of original certified Transcript of Record.



sons With Its Headquarters in the City and  
County of Denver, Colorado,

Plaintiffs,

vs.

THE BUTTE MINERS' UNION, a Corporation,  
Defendant.

**Bill of Complaint.**

To the Honorable Judge of the District Court of the  
United States for the District of Montana:

Charles H. Moyer, C. E. Mahoney, Earnest Mills,  
M. C. Leake, Thomas Owen, J. E. Commins and  
Charles Pogorelic, citizens and residents of the State  
of Colorado, and Yanco Terzich and J. C. Williams  
citizens and residents of the State of California, and  
C. E. Bright, and Charles Detrich, citizens and  
residents of the State of Arizona, and William  
Burns, J. A. Herdon and Thomas McManus, citizens  
and residents of the State of Nevada and E. G. Lock,  
James Hanley and W. T. Quinn, citizens and resi-  
dents of the State of Utah, and Phillip Ryan a citi-  
zen and resident of the State of Idaho, and William  
Stanlick a citizen and resident of the State of New  
Jersey, and Guy E. Miller and Rufus Blaylock citi-  
zens and residents of the State of Missouri, and  
Thomas Gorman a citizen and resident of the State  
of So. Dakota, and Emanuel De Mio, a citizen and  
resident of the State of Wisconsin, and L. S. Sexton  
a citizen and resident of the State of Kentucky, and  
Samuel W. Monroe, a citizen and resident of the  
State of New Mexico, and William Davidson, Frank  
Phillips and James Roberts citizens and residents of

British Columbia a part of the British Empire, and Joseph Gorman a citizen and resident of Ontario in the Dominion of Canada a part of the British Empire, bring this bill against The Butte Miners' Union, a Corporation, resident within the State of Montana, and a Montana corporation, and for cause of Complaint against said defendant, your Orators complain and say:

I. That the defendant, The Butte Miners' Union, is now, and was at all times mentioned herein a corporation organized and existing under the laws of the State of Montana. [2]

II. That the Western Federation of Miners is now and at all times herein mentioned was a voluntary unincorporated association of persons engaged in the work of mining, milling, smelting, and reduction of ores and minerals, and in and about mines, mills, and smelters in the United States of America, the Dominion of Canada and British Columbia, and is divided into local unions in the different states of the United States of America, and in the Dominion of Canada, and in British Columbia, and has its headquarters in the City and County of Denver, State of Colorado, one of the United States of America; and that the membership of said Western Federation of Miners is composed of several thousand persons, engaged in working in and about mines, mills, and smelters, and in and about the mining, milling, smelting, and reduction of ores and minerals,

III. That the members of the Western Federation of Miners before mentioned are very numerous being several thousand in number, and are residents

and citizens of several different states of the United States, and of the Dominion of Canada, a part of the British Empire, and of British Columbia a part of the British Empire; and that it is impracticable to bring them all before the Court as plaintiffs herein in person, and that the persons named herein as plaintiffs are members of said Western Federation of Miners, and bring this suit for the benefit of all the members of the Western Federation of Miners.

IV. That the plaintiffs herein named are citizens and residents as follows:

Charles H. Moyer, C. E. Mahoney, Earnest Mills, M. C. Leake, Thomas Owen, J. E. Commins and Charles Pogorelic are citizens and residents of the State of Colorado; That Yanco Terzich and J. C. Williams are citizens and residents of the State of California; That C. E. Bright, and Charles Detrich are citizens and residents of the State of Arizona; That William Burns, J. A. Herndon and Thomas McManus are citizens and residents of the State of Nevada; That E. G. Lock, James Hanley and W. T. Quinn are citizens and residents of the State of Utah; That Phillip Ryan is a citizen and resident of the State of Idaho; That William Stanlick is a citizen and resident of the State of New Jersey; That Guy E. Miller and Rufus Blaylock are citizens and residents of the State of Missouri; That [3] Thomas Gorman is a citizen and resident of the State of So. Dakota; That Emanuel De Mio, is a citizen and resident of the State of Wisconsin; That L. S. Sexton is a citizen and resident of the State of Kentucky; That Samuel W. Monroe is a citizen and resident of



the State of New Mexico; That William Davidson, Frank Phillips and James Roberts are citizens and residents of British Columbia a part of the British Empire; That Joseph Gorman is a citizen and resident of Ontario in the Dominion of Canada a part of the British Empire.

V. That on or about the 22d day of September, A. D. 1914, the defendant corporation, The Butte Miners' Union, made application to the Western Federation of Miners for a charter, a copy of which said application is as follows:

“To the President of the Western Federation of Miners, Denham Building, Denver, Colorado.

The Butte Miners' Union, a corporation, organized and existing under and by authority of the laws of the State of Montana, at a regular meeting held at the headquarters of the said corporation, 217 North Main St., Butte, Montana, on the 22d day of September, 1914, by a majority vote of its membership present at said meeting passed a resolution directing and instructing its president, secretary and board of directors or trustees, to apply to the Western Federation of Miners for a re-issuance of a charter to the said corporation to take the place of its first charter recently lost or destroyed, and said resolution empowered and authorized its aforesaid officers to take all necessary steps and do all necessary things in order to procure said charter.

Now, therefore, we, Frank O'Connor, President, Pat O'Neill, Secretary, and Mike A. Sullivan, James Walsh, James Ryan, Frank Martin, Pat Quigley, constituting the Board of Directors or Trustees of



the said corporation, pursuant to the said resolution and by authority thereof, hereby make application to you for the re-issuance of a charter for a local union to be issued to the said corporation, which shall be known as the Butte Miners' Union No. 1, Western Federation of Miners, which shall take the place of its first charter recently lost or destroyed.

It is hereby agreed in the acceptance of the said charter that the aforesaid corporation shall conform to all of its provisions and that the same are fully understood, and to the constitution, by-laws, rules and regulations of the Western Federation of Miners.

IN TESTIMONY WHEREOF, the said corporation has caused this application to be signed by its President, Secretary and Board of Directors or Trustees, and its corporate seal to be attached thereto this 22d day of September, 1914. [4]

THE BUTTE MINERS' UNION, a Corporation,

FRANK O'CONNOR, President,

PAT O'NEILL, Secretary,

M. A. SULLIVAN,

JAMES WALSH,

JAS. J. RYAN,

Board of Directors or Trustees."

That thereafter and in accordance with said application, the Western Federation of Miners by and through its president and secretary issued to said corporation a charter, a copy of which said charter is as follows:

**“WESTERN FEDERATION OF MINERS’  
CHARTER.**

KNOW ALL MEN BY THESE PRESENTS, that acting under the authority vested in us by the Laws of the above-named organization, we, the undersigned do hereby grant this Charter to the Butte Miners’ Union, a corporation, to be hereafter known and designated as the BUTTE MINERS’ UNION No. 1, WESTERN FEDERATION OF MINERS,

TO BE HELD BY THEM AND THEIR SUCCESSORS, and the aforesaid Union being properly installed, is hereby authorized and empowered to transact business and initiate into its membership, any person or persons lawfully proposed and elected in accordance with the constitution, rules and regulations of the Western Federation of Miners. It is hereby agreed in the acceptance of this Charter that the aforesaid union shall conform to the constitution, rules and regulations, and in default thereof, this charter may be revoked and the union suspended from all rights, and benefits, according to the laws of the Western Federation of Miners, and further, it is agreed that should the aforesaid union withdraw or be dissolved, suspended or forfeit this charter, then all property, moneys, books and papers, shall become the property of the Western Federation of Miners.

In Consideration of the due and faithful performance of the foregoing stipulations, the Western Federation of Miners do bind themselves to sustain said union in the exercise of all rights, privileges and benefits, as a local union under its protection.

IN WITNESS WHEREOF, we have subscribed our names and affixed our Seal of the Western Federation of Miners this Third day of October, 1914.

The Butte Miners' Union, organized June 13, 1878.

Original W. F. M. Charter dated May 15, 1893.

CHAS. H. MOYER,

President.

ERNEST MILLS,

Secretary-Treasurer."

And that said corporation accepted said charter, and worked under the same until on or about the 15th day of June, A. D. 1915. That the contract evidenced by said application and charter was made in the State of Montana.

VI. That on or about said 15th day of June, A. D. 1915, the said corporation, The Butte Miners' Union passed a resolution withdrawing [5] from the Western Federation of Miners and refusing to longer affiliate with the said Western Federation of Miners.

VII. That thereafter, on or about the 13th day of July, A. D. 1915, demand was made upon the said defendant corporation by and on behalf of the plaintiffs, the members of the Western Federation of Miners, that it turn over to, transfer to the Western Federation of Miners, all of the property, money, books, and papers that it owned on the date of the passage of the aforesaid resolution withdrawing from the Western Federation of Miners and refusing longer to affiliate with the Western Federation of Miners; that the said corporation has not turned over to, transferred to, or conveyed to, the Western Federation of Miners or in any manner or at all put

the property which it owned at the time of the passage of the said resolution last mentioned, in the hands of, or possession of the said Western Federation of Miners; and that the said corporation defendant still claims to be the owner of all of the property that it was the owner of at the time of the passage of the last-mentioned resolution, and denies that the Western Federation of Miners is the owner of, or entitled to the said property, and denies the right of the plaintiffs, the members of the Western Federation of Miners, to the ownership of said property, and refuses to allow them to take or hold said property, and refuses to convey, transfer or deliver said property to the plaintiffs, your orators.

VIII. That the Western Federation of Miners has at all times kept and performed all of the covenants and agreements by it to be kept and performed in accordance with the terms of the hereinbefore set forth charter to the Butte Miners' Union, a corporation, the defendant herein, and has at its own expense and the expense of its membership, prosecuted suits for and in behalf of said corporation, defendant, and has defended suits for and in behalf of said corporation, defendant, and has at all times helped the defendant corporation to benefit the condition of its membership in their employment and work in and about mines, mills and smelters. [6]

IX. That at the time of the passage of the aforesaid resolution by the said corporation defendant, withdrawing from the Western Federation of Miners, the said corporation defendant was the owner of the following property, real, personal and mixed :



“The South Fifty (50) feet of Lot Number One (1), and the South Fifty (50) feet of Lot Number Two (2), and the South Fifty (50) feet of the East Twenty-one (21) feet of Lot Number Three (3), all in Block Number Eleven (11) of the Butte Townsite, in the City of Butte, County of Silver Bow, State of Montana.

A Note and Mortgage to secure the said note, for the sum of Twenty-five thousand (\$25,000.00) Dollars, given by the Lead City Miners' Union, a corporation of the State of So. Dakota, to The Butte Miners' Union, the defendant herein. The mortgage securing said note having been heretofore foreclosed, and the property of the Lead City Miners' Union in Lead, So. Dakota, having been sold at Sheriff's sale under said foreclosure, and having been bought in for and in behalf of the Butte Miners' Union, a corporation, by Charles H. Moyer, President of the Western Federation of Miners.

Money and Certificates of deposit in the Daly Bank and Trust Companies Bank, in the City of Butte, Montana, in excess of Ten Thousand (\$10,000.00) Dollars.

And books, papers, seals, and other property, the exact nature of which is unknown to your Orators.

That all of the hereinbefore described property was and is at all times herein mentioned in value to exceed the sum of Fifty Thousand (\$50,000.00) Dollars.”

X. That under and by virtue of the hereinbefore set forth contract and agreement between the defendant corporation and the Western Federation of Miners all of the hereinbefore described property, became on or about the 15th day of June, 1915, the property of your orators, and that the defendant herein now refuses to perform the terms of said contract as the same is evidenced by the application and charter hereinbefore set forth by copy.

XI. Your orators pray that your Honor may decree, that the defendant has no estate or interest whatsoever in or to the said lands and property hereinbefore described, and that your orators be decreed to be the owners of and entitled to the possession of the hereinbefore described property, and that your Honor decree that the defendant herein perform all of the terms of the herein set forth charter to it from the Western Federation of Miners, and that it turn over to, transfer to, and convey to, the Western Federation of Miners all of the herein described property; and that the said defendant and its agents, servants, employees, and officers be enjoined and restrained from asserting any claim whatsoever in and to the said lands and property, adverse to your orators, and for such other and further relief as the equity of the case may require, and to your Honor [7] may seem meet. And may it please your Honor to grant unto your orators a Writ of Subpoena of the United States of America, directed to the said The Butte Miners' Union, a corporation, and to such other as shall in the discretion of your Honor appear necessary to the hearing and determination of this

cause, commanding them on a day certain, to appear and Answer unto this Bill of Complaint; and to abide and perform such Order and Decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

CANNING & GEAGAN,

P. E. GEAGAN, of Firm of Canning & Geagan,

E. P. KELLY,

O. N. HILTON. [8]

State of Colorado,

City and County of Denver,—ss.

Chas. H. Moyer, being first duly sworn upon oath deposes and says: That he has read the foregoing Bill of Complaint. That he is one of the persons named therein as plaintiff as a member of the Western Federation of Miners. That he knows the contents thereof, and that the same is true of his own knowledge except as to the matters and things therein stated upon information and belief and as to these matters and things he believes them to be true.

CHAS. H. MOYER,

As Trustee for the Western Federation of Miners.

Subscribed and sworn to before me this 8th day of September, 1915.

FANNIE N. PETERSON,

Notary Public for the State of Colorado, Residing at  
Denver, Colo.

My commission expires May 6, 1919.

State of Colorado,

City and County of Denver,—ss.

Ernest Mills, being first duly sworn upon oath de-

poses and says: That he has read the foregoing Bill of Complaint. That he is one of the persons named therein as plaintiff as a member of the Western Federation of Miners. That he knows the contents thereof, and that the same is true of his own knowledge except as to the matters and things therein stated upon information and belief, and as to these matters and things he believes them to be true.

ERNEST MILLS.

Subscribed and sworn to before me this 8th day of September, 1915.

FANNIE N. PETERSON,  
Notary Public for the State of Colorado. Residing  
at Denver, Colo.

My commission expires May-6-1919. [9]

No. 33. In the District Court of the United States of America, for the District of Montana. Chas. H. Moyer, as Trustee for the Western Federation of Miners, et al., Plaintiffs, vs. The Butte Miners Union, a Corporation, Defendant. Bill of Complaint. Filed Sept. 15, 1915. Geo. W. Sproule, Clerk. By. Harry H. Walker, Deputy Clerk. Canning & Geagan and E. P. Kelly, and O. N. Hilton, Attorneys for Plaintiffs. [10]

And thereafter, on the 17th day of November, 1915, the Answer of Defendant was filed, being as follows, to wit: [11]



*In the District Court of the United States of  
America, for the District of Montana.*

CHARLES H. MOYER, as Trustee for the Western Federation of Miners a Voluntary Unincorporated Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado, CHARLES H. MOYER, C. E. MAHONEY, ERNEST MILLS, THOMAS OWEN, J. E. COMMINS, CHARLES POGORELIC, YANCO TERZICH, J. C. WILLIAMS, C. E. BRIGHT, CHARLES DETRICH, WILLIAM BURNS, J. A. HERNDON, THOMAS McMANUS, E. G. LOCK, JAMES HANLEY, W. T. QUINN, PHILLIP RYAN, WILLIAM STANLICK, GUY E. MILLER, RUFUS BLAYLOCK, THOMAS GORMAN, EMANUEL DE MIO, L. S. SEXTON, SAMUEL W. MONROE, WILLIAM DAVIDSON, FRANK PHILLIPS, JAMES ROBERTS, JOSEPH GORMAN and M. C. LEAKE, as Members of the Western Federation of Miners a Voluntary Unincorporated Association of Persons With Its Headquarters in the City and County of Denver, Colorado.

Plaintiffs,

vs.

THE BUTTE MINERS UNION, a Corporation,  
Defendants.

**Answer.**

Comes now the above-named defendant, the Butte Miners' Union, a corporation, now and at all times hereafter, saving and reserving to itself all manner of benefit and advantage or exception to the many errors and insufficiencies in complainants' said Bill of Complaint contained, and for answer thereunto or to so much or such parts thereof, as this defendant is advised is material for to make answer unto the said Bill of Complaint and plaintiffs', it answers and says:

1. Admits all the allegations contained in paragraph one of plaintiffs' Bill of Complaint.

2. For answer to paragraph two of plaintiffs' Bill of Complaint, this answering defendant doth deny that the Western Federation of Miners is now or at all times herein mentioned, was a voluntary unincorporated association of persons engaged [12] in the work of mining, milling, smelting, and reduction of ores and minerals, and in and about mines, mills, and smelters in the United States of America, the Dominion of Canada and British Columbia, and is divided into local unions in the different states of the United States of America, and in the Dominion of Canada, and in British Columbia, and has its headquarters in the City and County of Denver, State of Colorado, one of the United States of America; and that the membership of the above-named Western Federation of Miners is composed of several thousand persons, engaged in working in and about mines, mills, and smelters, and in and

about the mining, milling, smelting, and reduction of ores and minerals; and further alleging, and by way of explanation, this answering defendant doth say that at one time the said Western Federation of Miners was a voluntary unincorporated association of persons engaged in the work of mining, milling, smelting and reduction of ores and minerals, and in and about mines, mills and smelters in the United States of America, the Dominion of Canada and British Columbia, and was divided into local unions in the different states of the United States and in the Dominion of Canada, and in British Columbia, and did have its headquarters in the City and County of Denver, State of Colorado, one of the United States of America; and that the membership of the above-named Western Federation of Miners was composed of several thousand persons, engaged in working in and about mines, mills, and smelters, and in and about the mining, milling, smelting and reduction of ores and minerals, but that for a long period of time, prior to the commencement of this action, by reason of extravagance, mismanagement, failure to account for the funds collected, and oppressive assessments levied upon the members of the above-named Western Federation of Miners, and because of the self perpetuation in official positions of the plaintiffs' Charles H. Moyer, President of the Western Federation of Miners, [13] above named, C. E. Mahoney, Vice-president of the Western Federation of Miners above named, Ernest Miller, Secretary-Treasurer of the Western Federation of Miners above named, Yanco Terzich, Member of the Execu-



tive Board of the Western Federation of Miners above named, Guy E. Miller, Member of the Executive Board of the Western Federation of Miners above named, and others, who are not named as plaintiffs in this action, to wit: John C. Lowney, Member of the Executive Board of the said Western Federation of Miners and Albert N. Gauthier, and a large number of others, who have been carried on the payroll of the above-named Western Federation of Miners, when it was the possessor of funds, and their extravagance in the distribution of the funds of the above-named Western Federation of Miners, when it became known that John C. Lowney, Executive Board member of the above-named Western Federation of Miners, besides *per diem* amounting to Seven and 50/100 (\$7.50) dollars per day in addition to travelling expenses and incidentals, between the 22d day of August, 1913, and December 9, 1913, received from the funds of the above-named Western Federation of Miners, the sum of Eighty Thousand (\$80,000) Dollars; that from September 26, 1913, to October 16, of the same year, Guy E. Miller, one of the plaintiffs above named, and member of the Executive Board of the above-named Western Federation of Miners, received out of the funds of the above-named Western Federation of Miners, besides *per diem* at the rate of Seven and 50/100 (\$7.50) Dollars per day, travelling expenses and incidentals, from September 26th to October 16th, 1913, the sum of One Hundred Thousand (\$100,000) Dollars; that C. E. Mahoney, Vice-president of the above-named Western Federation of Miners, and one of the above-



named plaintiffs, besides *per diem* at the rate of Seven and 50/100 (\$7.50) Dollars per day, with travelling expenses, received between the dates of October 24, 1913 and November 17, of the same year, the sum of Eighty Thousand (\$80,000) Dollars; that Albert N. Gauthier, a member of the above-named [14] Western Federation of Miners, appointed to handle its funds, between the dates of December 23, 1913, and May 20, 1914, the sum of One Hundred Eleven Thousand Six Hundred (\$111,600) Dollars, out of the funds of the above-named Western Federation of Miners; that the plaintiff, Charles H. Moyer, President of the above-named Western Federation of Miners, in a period of three months commencing December 20, 1913, received from the funds of the above-named Western Federation of Miners, the sum of Twenty-five Thousand (\$25,000) Dollars, exclusive of *per diem* at the rate of Seven and 50/100 (\$7.50) Dollars per day and travelling expenses; that there was expended by the above-named Western Federation of Miners through its paid employees, for the year beginning July 1, 1913, and ending July 1, 1914, the sum of Nine Hundred, Nineteen Thousand, Five Hundred and Twenty-two and 03/100 (919,522.03) Dollars, internal dissensions crept into the above-named Western Federation of Miners, and caused the withdrawal of nearly all the locals composing it, that the same became and was at the time of the commencement of this action, practically extinct, insolvent and unable to accomplish any good for any of its members, or to protect them in any manner, and was, prior to the commencement of this ac-

tion, and still is, discredited in all the mining sections formerly represented by it, and because of said mismanagement and extravagance heretofore set forth, was and is unable to pay its bills or expenses or the salaries of its officers and employees, and was, and is unable to continue the publication of its official organ, namely, The Miners Magazine, and owes a large indebtedness and to all intents and purposes has ceased to exist.

3. Answering paragraph 3 of plaintiffs' Bill of Complaint, this answering defendant doth deny that the members of the above-named Western Federation of Miners before mentioned are very numerous being several thousand in number, and are residents and citizens of several different states of the United States, and of the Dominion [15] of Canada, a part of the British Empire, and of British Columbia a part of the British Empire; and that it is impracticable to bring them all before the Court as plaintiffs herein in person, and that the persons named herein as plaintiffs are members of the above-named Western Federation of Miners, and bring this suit for the benefit of all the members of the above-named Western Federation of Miners, and by way of explanation, doth call the attention of this Honorable Court, and without again repeating the same to the answer of paragraph 2, of said Bill of Complaint and Complaint as above set forth and in addition to the said allegations doth further say and particularly answering the latter portion of the said paragraph 3, wherein the said alleged plaintiffs allege, that it is impracticable to bring all of the members of the

above-named Western Federation of Miners before this Court as plaintiffs herein in person, and that the persons named herein as plaintiffs are members of the above-named Western Federation of Miners, and bring this suit for the benefit of all the members of the above-named Western Federation of Miners, and doth further allege, that nearly all of the members who are still paying dues to the above-named Western Federation of Miners, reside in the Cities of Anaconda and Butte, State of Montana, and if they desired the institution of the above-entitled action, could without any inconvenience to themselves or the above alleged plaintiffs appear themselves as plaintiffs. Further answering said paragraph 3 this defendant doth allege, that the above-named plaintiffs nor none of them, have any right to appear as said plaintiffs and by way of explanation doth say, to this Honorable Court, that Charles H. Moyer, C. E. Mahoney, Ernest Mills, M. C. Leake, Thomas Owen, J. E. Commins, Charles Pogorelic, Yanco Terzich, J. C. Williams, C. E. Bright, Charles Detrich, William Burns, J. A. Herndon, Thomas McManus, E. G. Lock, James Hanley, W. T. Quinn, Phillip Ryan, William Stanlick, Guy E. Miller, Rufus Blaylock, Thomas Gorman, Emanuel De Mio, L. S. Sexton, Samuel W. Monroe, William Davidson, Frank Phillips, [16] James Roberts and Joseph Gorman, nor any of them, were not at the date of this action, members of any local miners union in good standing in the above-named Western Federation of Miners, and therefore, could not be members of the said Western Federation of Miners, and have no right, claim,



title or interest to the property of this answering defendant, because of the facts above set forth, and further explaining and answering said paragraph, this answering defendant doth say, that there is no local organization of the above-named Western Federation of Miners in the State of Colorado, where the pretended plaintiffs, Charles H. Moyer, C. E. Mahoney, Ernest Mills, M. C. Leake, Thomas Owen, J. E. Commins or Charles Pogorelic claim to reside and be citizens of, nor are the above-named alleged plaintiffs, Charles H. Moyer, C. E. Mahoney, Ernest Mills, M. C. Leake, Thomas Owen, J. E. Commins or Charles Pogorelic members in good standing in any local miners union in good standing in the above-named Western Federation of Miners in the State of Colorado, or any place else; that the plaintiffs Yanco Terzich or J. C. Williams are not members in good standing in any local union in good standing in the above-named Western Federation of Miners in the State of California or any place else; that the plaintiffs, C. E. Bright or Charles Detrich are not members in good standing in any local union of the above-named Western Federation of Miners in the State of Arizona or any place else; that the plaintiff, William Burns is not a member in good standing in any local union in the above-named Western Federation of Miners in the State of Nevada, or any place else, and is not a citizen of said State, but *is* a citizen of British Columbia; that the plaintiffs, J. A. Herdon or Thomas McManus are not members in good standing in any local union of the above-named West-



ern Federation of Miners in good standing in the State of Nevada or any place else; that the plaintiffs, E. G. Lock, James Hanley or W. T. Quinn are not members in good standing in any local union in good standing [17] in the above-named Western Federation of Miners in the State of Utah or any place else; that the plaintiff, Samuel W. Monroe is not a member in good standing in any local union that is in good standing in the above-named Western Federation of Miners in the State of Idaho or any place else; that William Stanlick is not a member in good standing in any local union that is in good standing in the above-named Western Federation of Miners in the State of New Jersey or any place else; that the plaintiffs, Guy E. Miller or Rufus Blaylock are not members in good standing in any local miners union in good standing in the above-named Western Federation of Miners in the State of Missouri, or any place else, nor is there any local miners unions existing in the said State of Missouri; that the plaintiff, Thomas Gorman is not a member in good standing in any local union in good standing in the above-named Western Federation of Miners in the State of South Dakota, or any place else, and defendant doth further say, that there is no local miners unions in the State of South Dakota; that the plaintiff Emanuel De Mio is not a member in good standing in any local miners union that is in good standing in the above-named Western Federation of Miners in the State of Wisconsin or any place else, and that there are no local miners unions in the State of Wisconsin that the plaintiff, L. S. Sexton, is not a member

in good standing in any local miners union that is in good standing in the above-named Western Federation of Miners in the State of Kentucky or any place else; that the plaintiff, Samuel W. Monroe is not a member in good standing in any local miners union in good standing in the above-named Western Federation of Miners in the State of New Mexico or any place else; that the plaintiffs, W. Davidson, Frank Phillips or James Roberts are not members in good standing in any local miners union in good standing in the above-named Western Federation of Miners in British Columbia or any place else; that the plaintiff, Joseph Gorman is not a member in good standing in any local union in good standing in the above-named Western Federation of Miners in Ontario in the Dominion of [18] Canada, or British Empire or any place else.

4. Answering paragraph 4 of plaintiff's Bill of Complaint and Complaint, this answering defendant doth allege that it has no knowledge or information thereof, sufficient to form a belief as to whether or not the alleged plaintiffs, C. H. Moyer, C. E. Mahoney, Ernest Mills, M. C. Leake, Thomas Owen, J. E. Commins, and Charles Pogorelic or either of them, are citizens or residents of the State of Colorado; further answering said paragraph, this answering defendant doth allege that it has no knowledge or information thereof, sufficient to form a belief as to whether or not the alleged plaintiffs, Yanco Terzich and J. C. Williams, or either of them, are citizens or residents of the State of California; further answering said paragraph this answering defendant

doth allege that it has no knowledge or information thereof, sufficient to form a belief as to whether or not the alleged plaintiffs C. E. Bright and Charles Detrich, or either of them, are citizens or residents of the State of Arizona; further answering said paragraph, this answering defendant doth allege, that it has no knowledge or information thereof, sufficient to form a belief as to whether or not the alleged plaintiff, William Burns, is a citizen or resident of the State of Nevada; further answering said paragraph this answering defendant doth allege, that it has no knowledge or information thereof sufficient to form a belief as to whether or not the alleged plaintiffs, J. A. Herndon and Thomas McManus, or either of them, are citizens or residents of the State of Nevada; further answering said paragraph this answering defendant doth allege that it has no knowledge or information thereof sufficient to form a belief as to whether or not the alleged plaintiffs, E. G. Lock, James Hanley and W. T. Quinn, or either of them, are citizens or residents of the State of Utah; further answering said paragraph this answering defendant doth allege, that it has no knowledge or information thereof, [19] sufficient to form a belief as to whether or not the alleged plaintiff, Phillip Ryan is a citizen or resident of the State of Idaho; further answering said paragraph, this answering defendant doth allege, that it has no knowledge or information thereof, sufficient to form a belief as to whether or not the alleged plaintiff William Stanlick is a citizen or resident of the State of New Jersey; further answering said paragraph this answer-



ing defendant doth allege that it has no knowledge or information thereof, sufficient to form a belief as to whether or not the alleged plaintiffs, Guy E. Miller and Rufus Blaylock, or either of them, are citizens or residents of the State of Missouri; further answering said paragraph this answering defendant doth allege, that it has no knowledge or information thereof, sufficient to form a belief as to whether or not the alleged plaintiff, Thomas Gorman, is a citizen or resident of the State of South Dakota; further answering said paragraph, this answering defendant doth allege that it has no knowledge or information thereof, sufficient to form a belief as to whether or not the plaintiff, Emanuel De Mio is a citizen or resident of the State of Wisconsin; further answering said paragraph this answering defendant doth allege that it has no knowledge or information thereof sufficient to form a belief as to whether or not the plaintiff, L. S. Sexton is a citizen or resident of the State of Kentucky; further answering said paragraph this answering defendant doth allege, that it has no knowledge or information thereof sufficient to form a belief as to whether or not Samuel W. Monroe is a citizen or resident of the State of New Mexico; further answering said paragraph this answering defendant doth allege that it has no knowledge or information thereof, sufficient to form a belief as to whether or not W. Davidson, Frank Phillips and James Roberts, or either of them, are citizens or residents of British Columbia; further answering said paragraph, this answering [20] defendant doth allege, that it has no knowledge or information



thereof, sufficient to form a belief as to whether or not Joseph Gorman is a citizen or resident of Ontario, in the Dominion of Canada.

5. Answering paragraph 5 of plaintiffs' said Bill of Complaint and Complaint, this answering defendant admits that on or about the 22d day of September, 1914, the defendant made application "for a reissuance of a charter to the said corporation to take the place of its first charter recently lost or destroyed," as fully set forth in said paragraph 5 in plaintiffs' Bill of Complaint and Complaint, and admits that the above-named Western Federation of Miners did send it a charter, a true copy of which said charter is set forth in said paragraph 5 of plaintiffs' Bill of Complaint and Complaint, but denies that the said charter is a reissuance of the charter "lost or destroyed," which said charter was dated May 15, 1893, and denies that this defendant accepted in any manner or at all, the said charter or worked at all under the same until the 13th day of June, 1915, or at all, and alleges the fact to be that the said charter was rejected by this defendant, upon its arrival, for the reason that it was not a reissuance or a duplicate of the former charter, heretofore referred to. Denies that any contract was made by said application and pretended charter, or at all.

6. Answering paragraph 6 of plaintiffs' Bill of Complaint and Complaint, this defendant admits all the allegations contained therein, and further alleges that for a long time prior thereto, to wit, since the receipt of the said pretended charter, above referred to, that it has refused to longer affiliate with the

above-named Western Federation of Miners, or to pay monthly dues thereto.

7. Answering paragraph 7 of plaintiffs' Bill of Complaint and Complaint, this answering defendant admits all the allegations contained therein. [21]

8. Answering paragraph 8 of plaintiffs' Bill of Complaint and Complaint, this answering defendant denies each and all of the allegations contained therein, and more particularly this answering defendant doth deny that the terms and conditions of the charter above referred to, were never agreed upon between plaintiffs and defendant; and this defendant doth further deny that the above-named Western Federation of Miners ever did or perform any of the terms or conditions of the original charter bearing date of May 15, 1893, and denies that the above-named Western Federation of Miners ever paid the expenses of litigation for this answering defendant, or ever helped the defendant corporation to benefit the condition of its membership in their employment and work in and about mines, mills and smelters, in any manner whatsoever, and on the contrary alleges the fact to be, that during the time this answering defendant was affiliated with the above-named Western Federation of Miners, the above-named Western Federation of Miners drew as per capita tax, money for supplies, donations and assessments, both forced and voluntary, from this defendant, a sum in excess of One Million (\$1,000,000) Dollars, and when members of this defendant would protest against the enormous claims made upon it, they would be informed by the executive officers of

the above-named Western Federation of Miners that they would have to pay said assessments whether they liked it or not, and this defendant doth further answer that when it was in trouble during the months of June, July, August, September and October of the year 1914, that the above-named Western Federation of Miners, through its executive officers, tried to draw its moneys on deposit in the banking-house of the Daly Bank and Trust Company, and did attempt to adopt an amendment to its constitution so as to give its president, Charles H. Moyer, authority to, contrary to the laws of the State of Montana, take possession, management and control of the property of The Butte Miners' Union, a corporation, the defendant herein, and did institute and prosecute suits [22] in the District Court of Silver Bow County, Montana, for said purpose, and the said plaintiff, Charles H. Moyer, assisted, aided and abetted by the plaintiffs, C. E. Mahoney, Ernest Mills, Guy E. Miller, and the executive board member, J. C. Lowney, attempted on numerous occasions to extort Five Thousand (\$5,000) Dollars from the already depleted treasury of this answering defendant, and did for said purpose, send officials and paid representatives of the above-named Western Federation of Miners, to urge the donation of said amount, during the months of July, August, September and October of the year 1914, and when this request for said donations was refused, the said officers of the above-named Western Federation of Miners, did cut off and set aside this answering defendant from any knowledge regarding what was being done by the above-named



Western Federation of Miners, and did refuse to furnish this defendant with a copy of its quarterly report, or to in any manner assist it to build up its membership and finances, and to all intents and purposes, did suspend this answering defendant.

8a. Further answering paragraph 8 of plaintiffs' Bill of Complaint and Complaint, this defendant doth allege that instead of the above-named plaintiffs and the above-named Western Federation of Miners prosecuting suits on behalf of this defendant, this defendant has at its own expense on numerous occasions personally employed counsel to defend the above-named Charles H. Moyer and other members of the above-named Western Federation of Miners, and has contributed large sums of money to carry on litigation for and on behalf of the above-named Western Federation of Miners.

9. Admits each and all of the allegations contained in paragraph 9 of plaintiffs' Bill of Complaint and Complaint.

10. Answering paragraph 10 of plaintiffs' Bill of Complaint and Complaint, this answering defendant, denies the existence of any contract between defendant and plaintiffs above named. And denies that, because of the existence of any such alleged contract, that all or any of the property of this defendant corporation [23] became on or about the 15th day of June, 1915, or at any other date, or at all, the property of plaintiffs and further allege the fact to be that this answering defendant corporation was at said time, and for many years last past, unable by virtue of the laws of Montana, to make or enter into



any such contract or to bind itself, its property or the property of its members in any such manner, or at all, or to dispose of the said property or its control in any manner, or at all, other than as provided by the laws of the State of Montana, or to subject itself or its members or its or their corporate property, to the jurisdiction of an authority existing outside of or beyond the control of the laws of the State of Montana, the State under which it was created. Admits that the defendant did heretofore refuse to turn over the said property under the terms of the said alleged contract as set forth in said paragraph 10 of plaintiffs' Bill of Complaint and Complaint. [24]

Further answering and as a first affirmative defense to the Bill of Complaint and Complaint of plaintiffs herein, this answering defendant alleges:

1. That the plaintiffs and neither of them are entitled to the relief prayed for or any relief.

For a second affirmative defense to the Bill of Complaint and Complaint of plaintiffs herein, this answering defendant alleges:

2. That the defendant is not answerable to the plaintiffs, or any of them, and if answerable to anyone at all, it is to the above-named Western Federation of Miners.

For a third affirmative defense to the Bill of Complaint and Complaint of plaintiffs herein, this answering defendant alleges:

3. That the defendant, The Butte Miners' Union, a Corporation, is now and has been ever since the 13th day of June, 1878, a *bona fide* voluntary labor organization, composed of men engaged in mining, milling,

smelting and the reduction of ores and minerals in and about the mines, mills and smelters in the County of Silver Bow, State of Montana, and during all of said time, has exercised jurisdiction over said class of labor as above set forth, in the County of Silver Bow, State of Montana, and ever since the 4th day of May, 1881, has been a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its place of business in the City of Butte, County of Silver Bow, State of Montana, and the said defendant did on or about the said 4th day of May, 1881, duly and regularly file in the office of the county clerk and recorder of Silver Bow County, Montana, its articles of incorporation, a true copy of which said articles of incorporation are attached to Exhibit "L" hereof, marked Exhibit "I" thereof, and made a part of this answer.

4. That the said The Butte Miners' Union, a Corporation, [25] defendant herein, did thereafter, in compliance with the said articles of incorporation, adopt a constitution and by-laws for its government, which said constitution and by-laws were not and are not in conflict with the said articles of incorporation, and did proceed to do and perform each and all of the obligations by it to be done and performed to its members in compliance with the laws of the State of Montana.

5. That thereafter on or about the 8th day of February, 1901, the above-named defendant filed in said clerk and recorder's office an extension of its corporate existence, a true copy of which extension is attached to exhibit "L" hereof, marked Exhibit "II"

thereof, and made a part of this Answer.

6. That thereafter, this answering defendant filed in said county clerk and recorder's office, a certificate of change of name of said corporation, by changing the name to "The Butte Miners' Union," its commonly known and accepted name, instead of "Miners' Union," a true copy of which certificate is attached to exhibit "L" hereof, marked Exhibit "III" thereof, and made a part of this Answer, and the original of all exhibits in this paragraph were duly filed in the office of the Secretary of State of Montana.

7. That ever since said 18th day of April, A. D. 1881, when the said defendant became a corporation, under and by virtue of the laws of the then Territory of Montana, the said defendant has carried on and conducted all of its business under and by virtue of its articles of incorporation, and as a corporation, and not otherwise.

8. That the said defendant, The Butte Miners' Union, a corporation, has never asked to wind up its affairs or wound up its affairs, or been dissolved or disbanded, according to the laws of Montana, or in any manner whatsoever.

9. That in compliance with its constitution and by-laws, this answering defendant, since its organization as a voluntary association [26] of miners and workingmen and later as a corporation, and for the purpose of building a hall in which to hold its meetings and transact its business, establishing a library, caring for its sick and burying its dead, did by their consent collect monthly dues from each of its members, which said money so collected was used



for the purposes above specified.

10. That the above-named plaintiffs, or any of them, did not have anything to do with the organization or creation of this answering defendant, either as a voluntary association of miners, or as a corporation, organized and existing under and by virtue of the laws of Montana, but, on the contrary, this answering defendant was organized as a corporation, and doing business as such for a period of more than twelve years prior to the organization of the above-named Western Federation of Miners, an alleged voluntary association of persons, with its headquarters in the City and County of Denver, State of Colorado, and that prior to its incorporation it had been doing business as a voluntary industrial organization, as above set forth, for a period of nearly three (3) years, which would antedate the birth of the above-named Western Federation of Miners, a period of about fifteen (15) years.

11. That the relations existing between this answering defendant and its members was a voluntary relation.

12. That by reason of the monthly dues so collected as aforesaid, and the investment of its surplus funds created thereby, this answering defendant was enabled to build a hall, care for its sick and distressed members, bury its dead and fulfill the objects of its corporate existence, and was further able to deposit in the banks of Silver Bow County a large surplus of money, which on or about the 15th day of May, 1893, amounted to the sum of approximately Sixty Thousand (\$60,000) Dollars, and did, during said



time, by reason of its income from dues and revenue derived from the rent of its hall and interest derived from its deposits, after [27] caring for its sick and burying its dead, and in every manner fulfilling the objects of its corporate existence, have, in addition to the amount set forth, moneys loaned to other miners' unions in the sum of approximately Fifteen Thousand (\$15,000) Dollars.

13. That no part of the said moneys and other properties above set forth was created by the plaintiffs or any of them or in any other manner than as above specified.

14. That on or about the latter part of the month of April and the early part of the month of May, 1893, this answering defendant, in conjunction with other miners' unions located in the County of Shoshone, State of Idaho, in the Black Hills, District of South Dakota, and at the towns of Granite Castle, Neihart and Barker, in the State of Montana, called a convention, composed of delegates elected by said unions to meet in the City of Butte, for the purpose of creating a better understanding and the harmonious interchange of working cards between themselves, and to create a central body, composed of delegates elected from each local in attendance thereat, in proportion to the number of its members, through which communications could be received and sent, and which could arbitrate possible differences that might arise between locals composing it, or between employers and its locals, and did create the above-named Western Federation of Miners.

15. This answering defendant further alleges that

membership of locals in the above-named Western Federation of Miners is solely voluntary; there being no means or method by which a local can be compelled to join the above-named Western Federation of Miners, or by which the above-named Western Federation of Miners can compel the said local to retain its membership after admission. The existence of the above-named Western Federation of Miners, depending solely upon the voluntary revenue derived as per capita tax from different locals, it not having any other income, could not exist without the [28] payment of the said per capita, while on the contrary, the locals comprising it can exist independent of the above-named Western Federation of Miners.

16. That upon its organization as a central body, the above-named Western Federation of Miners did adopt a constitution and by-laws which said constitution and by-laws governed the conditions under which new locals could be admitted to membership, which said constitutional provision providing for admission to membership is as follows:

“Section 3, Article 1.

Whenever twenty or more persons working as specified in Section 1 of this article, shall be found that will be self-supporting, they shall, on application, be granted a charter. Provided that no charter shall be issued the effect of which is to segregate the crafts engaged in the mining industry.”

And did provide a method by which revenues could be raised, which said provision relating thereto, is as follows:

## “Section 1, Article VI.

The revenue of the Federation shall be derived from a charter fee of ten dollars and per capita tax of twenty-five cents per month on all monthly dues collected in accordance with the stamp system, to be paid from the general fund of each union, through the purchase of said stamps in advance, and in case of emergency such assessments, as in the judgment of the Executive Board of convention may be necessary, the same shall be paid from the general fund, and based on the preceding monthly report previous to such assessment.”

and the said section above quoted, provides the only method by which revenue or income of the above-named Federation can be obtained, there appearing no where in the said constitution and by-laws of the above-named Western Federation of Miners, any forfeiture clause or any other method whatever appearing therein, whereby the property of any one of its locals can become forfeited to or confiscated by it, upon the withdrawal of the said local from membership in the above-named Western Federation of Miners, a true copy of the constitution and by-laws of the above-named Western Federation of Miners is attached hereto, marked exhibit “D” and made a part of this answer. [29]

17. That thereafter on or about the 15th, day of May, 1893, this answering defendant accepted a charter from the above-named Western Federation of Miners, which said charter contained no forfeiture clause of its property or property rights whatever,



now did this answering defendant have any authority or power under the laws of Montana, to make or enter into any such contract.

18. That for sometime subsequent to May, 1893, the above-named Western Federation of Miners, an alleged voluntary organization and association of persons, composed of delegates from local unions, with its headquarters in the City and County of Denver, State of Colorado, was a *bona fide* labor organization, composed as aforesaid, of various local unions or organizations in different states and territories in the United States of America and also in Canada.

19. That thereafter on or about the 15th day of May, 1893, this answering defendant received and accepted a charter from the above-named Western Federation of Miners, which said charter contained no forfeiture clause of its property or property rights whatsoever, nor did anything of value pass from the above-named Western Federation of Miners to this answering defendant, The Butte Miners' Union, a corporation, by reason of its acceptance of the said charter, to repay it for the per capita tax called for, under the said charter to be paid by this defendant, The Butte Miners' Union, a corporation, to the above-named Western Federation of Miners, and that any per capita, assessments or moneys received from this answering defendant, was given by it to and received by the above-named Western Federation of Miners, without any consideration whatever, passing from it to this answering defendant, nor did this answering defendant, have any authority or



power under the laws of Montana, to make or enter into any contract that would in any manner place itself, its property or the corporate property of itself or its members under the jurisdiction and control of an authority existing outside of or beyond the control of the laws of the State of Montana, the State under which it was created. [30]

20. That between the 15th day of May, 1893, the date of issuance of the first charter and the 1st day of December, 1914, The Butte Miners' Union, a Corporation, defendant herein as aforesaid, has paid to the above-named Western Federation of Miners, as per capita tax, assessments levied and donations applied for, a sum in excess of One Million (\$1,000,000) Dollars.

21. That the said The Butte Miners' Union, a Corporation, the defendant herein, between the 1st day of July, 1913, and the first day of July, 1914, paid as assessments to the above-named Western Federation of Miners, One Hundred Thirty-eight Thousand Eight Hundred and Twenty-five and 60/100 (\$138,825.60) Dollars, donations, Twenty-one Hundred (\$2100) Dollars, per capita, Seventeen Thousand Five Hundred (\$17,500) Dollars, supplies, Five Hundred (\$500) Dollars, amounting to the total sum of One Hundred Fifty-eight Thousand Nine Hundred and Twenty-five and 60/100 (\$158,925.60) Dollars.

22. That between January 5, 1914, and June 15th, of said year, in dues, assessments and donations, the above-named Western Federation of Miners, re-

ceived the following sums of money from The Butte Miners' Union, a Corporation:

January	5.....	\$ 2,000.00
"	19.....	10,000.00
"	22.....	10,000.00
February	4.....	5,000.00
"	5.....	1,250.00
"	16.....	10,000.00
"	23.....	1,250.00
"	23.....	100.00
March	6.....	8,000.00
"	23.....	10,000.00
"	23.....	1,250.00
April	16.....	6,000.00
"	16.....	450.00
"	22.....	8,000.00
May	20.....	1,000.00
June	4.....	1,250.00
"	15.....	3,000.00

Making a total of Seventy-eight Thousand, Five Hundred and Fifty (78,550) Dollars.

23. That upon January 1, 1914, the above-named Western Federation [31] of Miners claimed that this defendant, The Butte Miners' Union, a Corporation, owed it a balance of Forty-four Thousand Two Hundred and Sixty-eight and 15/100 (\$44,268.15) Dollars, and from said date, January 1, 1914, to June 2d of said year, the following additional amounts:

January	1.....	\$44,268.15
"	16.....	1,250.00
"	21.....	55.50
February	1.....	15,428.00
"	5.....	1,250.00
"	10.....	166.50
March	1.....	20,317.50
"	2.....	1,250.00
"	2.....	7.50
"	18.....	1,250.00
April	1.....	20,639.50
"	10.....	1,250.00
May	1.....	19,656.00
"	7.....	1,250.00
June	1.....	7,576.00
"	2.....	1,250.00

making a total amount owing from January 1, 1914, to June 2, 1914, One Hundred Thirty-six Thousand, Eight Hundred and Sixty-four and 65/100 (\$136,864.65) Dollars.

24. After receiving the said sum of Seventy-eight Thousand Five Hundred and Fifty (\$78,550) Dollars, in a period of six (6) months, the above-named Western Federation of Miners, claim that at said time, to wit, June 13 1914, there was due and owing from the defendant herein, The Butte Miners' Union, a Corporation, to the above-named Western Federation of Miners, a balance of Sixty Thousand Four Hundred and Fifteen and 65/100 (\$60,415.65) Dollars.

25. This defendant further alleges that during all of the times in which the above-named Western

Federation of Miners, demanded and received the said sums of money above set forth, from the Butte Miners' Union, a Corporation, defendant herein, the said corporation was compelled to pay the said sums of money to the above-named Western Federation of Miners, through its officers and salaried agents and were not permitted to, at any time, send the money themselves, to the places wherein the said officers of the above-named Western Federation of Miners claimed it was wanted for and was to be sent.

[32]

26. This answering defendant further alleges, that through all of the years in which the said The Butte Miners' Union, a Corporation, defendant herein, was a local of the above-named Western Federation of Miners, that it has not received *on* cent of benefit in any shape, manner or form from the above-named Western Federation of Miners.

27. This answering defendant further alleges, that on or about the 16th day of May, 1893, the said The Butte Miners' Union, a Corporation, defendant herein, had thousands of members and thousands of dollars in its treasury. That all of its members were working in harmony and that they enjoyed the respect, confidence and good will of all of the employers of miners in the County of Silver Bow, State of Montana, and its union cards were recognized and respected by all of them.

28. That because of the tyranny and many exactions of the above-named Western Federation of Miners, and the manner in which the money of The Butte Miners' Union, a Corporation, defendant here-



in, had been taken by the above-named Western Federation of Miners, without any return to The Butte Miners' Union, a Corporation, dissatisfaction was created among its members and the citizens of Silver Bow County, to such an extent that many of defendants members revolted on the 13th day of June, 1914, and later on the 23d day of said month, when the plaintiff, Charles H. Moyer, came to Butte to run the business of The Butte Miners' Union, a Corporation, defendant herein, assisted by many others, they again destroyed a large amount of property of this defendant, including the charter above-mentioned, and attempted to capture and hang the plaintiff, Charles H. Moyer.

29. That shortly after the 13th day of June, 1914, the date on which the charter from the above-named Western Federation of Miners, to this answering defendant, bearing date of May 15, 1893, was destroyed, the above-named plaintiff, Charles H. Moyer, attempted [33] to draw the moneys, the property of this answering defendant deposited by it in the banking-house of the Daly Bank and Trust Company, and did thereafter, for a period of more than four (4) months, continually appeal to this answering defendant for funds and requested of it a donation of Five Thousand (\$5,000) Dollars and did send numerous paid servants and agents of the said Charles H. Moyer to the meetings of this answering defendant, for the purpose of extorting from it the same sum of Five Thousand (\$5,000) Dollars.

30. That for the purpose of avoiding the importunities of the said officers and servants of the above-

named Western Federation of Miners, this answering defendant did donate One Hundred (\$100) Dollars to the said Moyer, et al. That in addition to the said request as aforesaid, this answering defendant was continually harassed by the presentation to it of bills, to wit, Expenses incurred by the above-named plaintiff, Charles H. Moyer, in the hiring of gunmen to protect him in the City of Butte, from on or about the 18th day of June, 1914, until the 24th day of June of said year, and for the payment of rifles contracted for by him and also rifles borrowed by him during said time, and which were lost by him or taken away from him, on the night of the 23d day of June, 1914, which said bills so contracted by the said Charles H. Moyer, as aforesaid, were paid under protest by this answering defendant.

31. That on or about the 22d day of September, A. D. 1914, for the purpose of keeping in communication with other local organizations of miners, this answering defendant applied to the above-named Western Federation of Miners, for a reissuance of its charter bearing date of May 15, 1893. That thereafter a certain charter, which was not a reissuance or a duplicate of the charter above referred to, was sent to this answering defendant and rejected by it.

[34]

32. That upon the refusal of this answering defendant, The Butte Miners' Union, a Corporation, to accept the charter so sent, the above-named plaintiffs, Charles H. Moyer, C. E. Mahoney, Ernest Mills, Guy E. Miller, and others refused to recognize this answering defendant or to communicate with them in

any manner, other than asking for money, and did refuse to furnish any statement of its financial standing or quarterly report, or any other information to this answering defendant, and to all intents and purposes, suspended this answering defendant, and did thereafter, on or about the 18th day of December, 1914, bring an action in the District Court of Silver Bow County, for the purpose of getting the possession, management and control over the property of this answering defendant, and did procure an order temporarily restraining this answering defendant from repairing its hall or improving its property in any manner.

33. This answering defendant further says: The said requests for donations for the payment of the numerous bills of the above-named Western Federation of Miners and its officers, during the later part of the month of June, and the months of July, August, September, October, November and December, 1914, became so numerous, expensive and burdensome, that the loyal members of this answering defendant, The Butte Miners' Union, a Corporation, who had remained loyal to it, during all of its troubles, refused to longer contribute money for its support and it did thereafter, on or about the 15th day of June, 1915, by resolution of this defendant, withdraw as a local, and has not been since said date in any manner connected with the above-named Western Federation of Miners.

This answering defendant doth further say to this Honorable Court, that during all of the times that it was acting as a local of the above-named Western



Federation of Miners, and contributing vast sums of money for its support, that it never received any benefit, financial or otherwise, of any kind, character or description from the said the above-named Western Federation of Miners. [35]

For a fourth affirmative defense to the Bill of Complaint and Complaint of plaintiffs herein, this answering defendant alleges:

34. That heretofore and on or about the 17th day of December, 1914, an action, numbered A-6590, was commenced by the filing of a Complaint in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, by The Western Federation of Miners, a voluntary organization, association of persons with its headquarters in the City and County of Denver, State of Colorado, and CHARLES H. MOYER, President of the Western Federation of Miners, a voluntary organization and association of persons, with its headquarters in the City and County of Denver, and State of Colorado, GUY E. MILLER and ED O'BYRNE, Plaintiffs, vs. MARTIN SCAHILL, PATRICK LEE, PATRICK O'NEILL, MIKE A. SULLIVAN, JAMES RYAN, JAMES WALSH, and PATRICK QUIGLEY, Defendants. And thereafter on or about the 8th day of February, 1915, the said plaintiffs therein, in said action, by leave of court served and filed their Amended Complaint in said action, a true copy of which Amended Complaint is hereto attached, marked Exhibit "E," and made a part of this answer; that thereafter, on or about the 20th day of February, 1915, the said defendants in said action,



duly served and filed their answer to said Amended Complaint, a true copy of which answer is hereto attached, marked Exhibit "F," and made a part of this Answer; that thereafter on or about the 13th day of May, 1915, the said plaintiffs in said action, by leave of court first had and obtained, filed their reply to said answer a true copy of which reply is hereto attached, marked Exhibit "G," and made a part of this Answer; that thereafter on or about the — day of May, 1915, the said plaintiffs in said action, by leave of court first had and obtained, amended said Amended Complaint, by substituting for Exhibit "D" thereof a power of attorney from Charles H. Moyer to Guy E. Miller, [36] another and different power of attorney from Charles H. Moyer to Guy E. Miller, a true copy of which last-mentioned power of attorney is hereto attached, marked Exhibit "H," and made a part of this Answer; that on or about the 8th day of February, 1915, the said District Court of the Second Judicial District made and entered an order that the said defendants in said action appear before said court to show cause, why a temporary restraining order, should not issue in said court restraining said defendants in said action from doing certain acts, a true copy of which said order to show cause is hereto attached, marked Exhibit "I," and made a part of this Answer; that thereafter and on or about the 20th day of February, 1915, the said order came regularly on for hearing and the hearing was not completed, and said order, was at divers times, partially heard, and was finally on or about the 2d day of June, 1915, finally sub-

mitted and the said Court, which after hearing the evidence submitted and the arguments of counsel, afterwards on the 12th day of June, 1915, duly made and entered an order restraining the said defendants in said action, except James Ryan and James Walsh, from doing certain acts, a true copy of which order is hereto attached marked Exhibit "J," and made a part of this Answer; that thereafter on or about June 14, 1915, the said Court, made and entered another order, a true copy of which order is hereto attached marked Exhibit "K," and made a part of this answer; that thereafter and on or about the 28th day of June, 1915, the said The Butte Miners' Union, a Corporation, Martin Seahill, Patrick Lee, Patrick O'Neill, Mike A. Sullivan and Patrick Quigley, on the relation of the State of Montana, duly commenced proceedings in the Supreme Court of the State of Montana, to annul said orders of the District Court, by the filing of an affidavit against the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, and the Hon. John B. McClernan, one of the Judges thereof; Western Federation [37] of Miners, a voluntary organization, association of persons with its headquarters in the City and County of Denver, State of Colorado; Charles H. Moyer, president of the Western Federation of Miners, a voluntary organization and association of persons with its headquarters in the City and County of Denver, State of Colorado; Guy E. Miller and Ed O'Byrne, as respondents and defendants, a true copy of which affidavit is hereto

attached, marked Exhibit "L," and made a part of this Answer; that thereafter and on said 28th day of June, 1915, the said Supreme Court of the State of Montana, duly made and entered an order, ordering the said respondents and defendants in said proceedings to be and appear before said Supreme Court on the 3d day of July, 1915, then and there to show cause, if any they had, why said orders made on said June 12, 1915, and June 14, 1915, should not be annulled and set aside, a true copy of which order to show cause is hereto attached marked Exhibit "M," and made a part of this Answer; that on said 3d day of July, 1915, said order to show cause in said proceedings came duly and regularly on for hearing in said Supreme Court, and the said respondents and defendants in said proceedings served and filed their motion to quash the said order to show cause, a true copy of which motion is hereto attached, marked Exhibit "N," and made a part of this Answer; that on said 3d day of July, 1915, the said respondents and defendants in said proceedings served and filed their answer, a true copy of which answer is hereto attached, marked Exhibit "N-I," and made a part of this Answer; that by order of said Supreme Court the matters and things in said Answer alleged were deemed denied; that on said 3d day of July, 1915, said action and proceedings were submitted to the said Supreme Court for decision; that afterwards, on the 7th day of July, 1915, the said Supreme Court duly and regularly made, gave and



entered its judgment in said matter, annulling the said orders of the said District Court, a true copy of which judgment is hereto attached, marked Exhibit "O," and made a part of this Answer. [38]

35. That by reason of the premises and by said judgment of said Supreme Court the matters and things in the plaintiffs' Bill of Complaint in this action contained were finally adjudicated and settled and the plaintiffs are each and all thereby estopped and barred from prosecuting or maintaining this action and from prosecuting or maintaining this proceeding.

For a fifth affirmative defense to the Bill of Complaint and Complaint of plaintiffs, this answering defendant alleges:

36. That this defendant received no consideration whatever from the above-named Western Federation of Miners, or any person, for the said original charter or the said pretended reissuance of said charter, or any part of either, and there is no consideration and there was no consideration for any part of either.

For a sixth affirmative defense to the Bill of Complaint and Complaint of plaintiffs, this answering defendant alleges:

37. That the defendant herein received no consideration whatever from the above-named Western Federation of Miners, or any person, nor is there nor was there any consideration whatever, for the following clause of said pretended reissuance of said charter, or any part thereof, to wit: "It is



agreed that should the aforesaid union withdraw or be dissolved, suspended, or forfeit this charter, then all property, moneys, books and papers shall become the property of the Western Federation of Miners"; nor is there nor was there any such clause, or any part thereof, either in words or in substance, in said original charter, which original charter has been lost or destroyed and cannot be herein in this answer set forth. [39]

For a seventh affirmative defense to the Bill of Complaint and Complaint of plaintiffs, this answering defendant alleges:

38. That there is no provision in said constitution and by-laws of the above-named Western Federation of Miners, exhibit "D" of this answer, and no provision exists or ever existed, authorizing the issuance, or empowering any officer or member of the above-named Western Federation of Miners or the above-named Western Federation of Miners to issue any charter, or other instrument, containing the following clause, or any part thereof, either in words or in substance, to wit: "It is agreed that should the aforesaid union withdraw or be dissolved, suspended, or forfeit this charter, then all property, moneys, books and papers, shall become the property of the Western Federation of Miners," and said clause was inserted in the said pretended reissuance of said original charter without any authority whatever and contrary to said constitution and by-laws, and is in excess of the power granted by said constitution and by-laws, and is wholly null and void, and is contrary to public policy.

For an eighth affirmative defense to the Bill of Complaint and Complaint of plaintiffs, this answering defendant alleges:

39. That the said pretended reissuance of said charter, set forth in paragraph V of said Bill of Complaint, and the contract therein attempted to be expressed, namely, "It is agreed that should the afore-said union withdraw or be dissolved, suspended, or forfeit this charter, then all property, moneys, books and papers shall become the property of the Western Federation of Miners," are each and all illegal and against public policy and each and all and every portion thereof contravene the express provisions of section 4226, Revised Codes of Montana of 1907, as amended by chapter 101 of the Session Laws, 1909, of the 11th Legislative Assembly of the State of Montana. [40]

For a ninth affirmative defense to the Bill of Complaint and Complaint of plaintiffs, this answering defendant alleges:

40. That the said pretended reissuance of said charter, set forth in paragraph V of said Bill of Complaint, and the contract therein attempted to be expressed, namely, "It is agreed that should the afore-said union withdraw or be dissolved, suspended, or forfeit this charter, then all property, moneys, books and papers shall become the property of the Western Federation of Miners," are each and all illegal and against public policy and each and all and every portion thereof contravene the express provision of sections 3889 and 3890 of the Revised Codes of the State of Montana of 1907. [41]

WHEREFORE, having fully answered, this answering defendant prays that your Honor may decree that the plaintiffs take nothing whatever by this action, and that defendant be decreed the sole owner of the property described in plaintiff's Bill of Complaint and Complaint, and that it be further decreed that the said plaintiffs and each and all of them, their agents, servants, employees, officers and all persons acting by their direction and under their control, be permanently and forever enjoined and restrained from asserting any claim whatsoever in or to the said lands and personal property of the defendant corporation in any manner, and that it be decreed entitled to its costs herein expended.

PETER BREEN,

Attorney for Defendant. [42]

State of Montana,

County of Silver Bow,—ss.

Charles Baxter, being first duly sworn, says: That he is an officer, to wit, the president of The Butte Miners' Union, a corporation, the defendant named in the within answer; that he makes this verification for and on behalf of said defendant; that he has read the said answer and knows the contents thereof and that the matters stated therein are true to his best knowledge, information and belief.

CHARLES BAXTER.

Subscribed and sworn to before me November 16th, 1915.

[Notarial Seal]

PETER BREEN,

Notary Public for the State of Montana, residing at Butte, Montana.

My commission expires June 2d, 1916. [43]

**Plaintiff's Exhibit "D"—Charter Issued by Western  
Federation of Miners of America to Aspen  
Miners' Union, No. 6.**

**CONSTITUTION AND BY-LAWS**

of the

**Western Federation of Miners**

Adopted at

**BUTTE CITY, MONT.**

May 19, 1893

Amended at Salt Lake City, Utah, 1894.

Amended at Denver, Colorado, 1895.

Amended at Denver, Colorado, 1896.

Amended at Salt Lake City, Utah, 1897.

Amended at Salt Lake City, Utah, 1898.

Amended at Salt Lake City, Utah, 1899.

Amended at Denver, Colorado, May, 1900.

Amended at Denver, Colorado, May, 1901.

Amended and revised at Denver, Colorado, November, 1901.

Amended at Denver, Colorado, May, 1902.

Amended at Denver, Colorado, May, 1903.

Amended at Denver, Colorado, May, 1904.

Amended at Salt Lake City, Utah, 1905.

Amended at Denver, Colorado, May, 1906.

Amended at Denver, Colorado, June, 1907.

Amended at Denver, Colorado, July, 1908.

Amended at Denver, Colorado, July, 1909.

Amended at Denver, Colorado, July, 1910.

Amended at Butte, Montana, July, 1911.

Amended at Victor, Colorado, July, 1912. [44]



## **CONSTITUTION AND BY-LAWS**

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Amended at Denver, Colorado, July, 1910.

Amended at Butte, Montana, July, 1911.

Amended at Victor, Colorado, July, 1912.

Great Western Pub. Co. Denver [45]

PREAMBLE.

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1    1. We hold that there is a class struggle in  
2 Society and that this struggle is caused by eco-  
3 nomic conditions.

4    2. We affirm the economic condition of the  
5 producer to be that he is exploited of the wealth  
6 which he produces, being allowed to retain  
7 barely sufficient for his elementary necessities.

8    3. We hold that the class struggle will  
9 continue until the producer is recognized as  
10 the sole master of his product.

11   4. We assert that the working class, and  
12 it alone, can and must achieve its own eman-  
13 cipation.

14   5. We hold, finally, that an industrial union  
15 and the concerted political action of all wage  
16 workers, is the only method of attaining this  
17 end.

18   6. Therefore, we, the wage slaves, em-  
19 ployed in and around the mines, mills, smel-  
20 ters, tunnels, open pits and open cuts, have  
21 associated in the Western Federation of  
22 Miners. [46]

## CONSTITUTION

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### Article I.

1 Section 1. This organization shall be known  
2 as the Western Federation of Miners, and shall  
3 be composed of all persons working in and  
4 around mines, mills, smelters, tunnels, open  
5 pits and open cuts, organized into unions pay-  
6 ing per capita tax to the Federation.

7 Sec. 2. The objects of this organization  
8 shall be to unite the various persons working  
9 in and around the mines, mills, smelters, tun-  
10 nels, open pits and open cuts, into one central  
11 body, to practice those virtues that adorn so-  
12 ciety and remind man of his duty to his fellow  
13 man, the elevation of his position and the main-  
14 tenance of the rights of the workers to in-  
15 crease the wages and improve the conditions of  
16 employment of our members by legislation, con-  
17 ciliation, joint agreements or strikes.

18 Sec. 3. Whenever twenty or more persons,  
19 working as specified in Section 1 of this article,  
20 shall be found that will be self-supporting,  
21 they shall, on application, be granted a char-  
22 ter. Provided that no charter shall be issued  
23 the effect of which is to segregate the crafts  
24 engaged in the mining industry.

## Article II.

## Convention.

25 Section 1. This Federation shall hold its bi-  
26 ennial convention on the third Monday in July,  
27 at such place as the convention shall designate  
28 before adjournment of any session thereof.

29 Sec. 2. Each union shall be entitled to one  
30 delegate for one hundred members or less, and  
31 one for each additional one hundred or major-  
32 ity fraction thereof. Provided, no delegate shall  
33 in any event, either holding proxy votes or rep-  
34 resenting a union entitled to a greater number,  
35 cast more than five votes. [47]

1 Sec. 3. Representation in the biennial con-  
2 vention shall be based on the April report  
3 prior to the holding of the convention, and the  
4 January report of each year shall be an annual  
5 report; provided, in case a special convention  
6 is held, the representation shall be based on  
7 the last monthly report prior to the calling of  
8 the special convention.

9 Sec. 4. Each union shall elect a delegate or  
10 delegates and alternates to attend the biennial  
11 convention of the Federation. Such delegates  
12 and alternates shall be nominated and elected  
13 in compliance with Section 1, Article III of the  
14 By-Laws, and said election of delegates and al-  
15 ternates shall take place at the semi-annual  
16 election of all local unions, the first meeting in  
17 June. The alternate delegate shall only at-  
18 tend and be entitled to a seat in the convention



19 when the regularly elected delegate fails, re-  
20 fuses or is unable to be present to discharge  
21 his duties. To be eligible, a delegate or alter-  
22 nate must be a bona fide wage worker in the  
23 jurisdiction of his local union, or one who is  
24 employed by his local union, or the Western  
25 Federation of Miners, having a membership in  
26 good standing in the Western Federation of  
27 Miners for a period of not less than one year,  
28 immediately preceding the date of his nomina-  
29 tion; provided, however, that the provisions of  
30 this section shall not apply to the unions and  
31 members thereof which have been organized  
32 for a length of time less than that mentioned  
33 herein. Delegates shall present their creden-  
34 tials and have them passed upon before taking  
35 their seats in the convention. Delegates in at-  
36 tendance at the convention and absenting them-  
37 selves without permission from the sessions  
38 thereof shall not be entitled to their per diem  
39 for any day, or part of a day, upon which they  
40 were absent. Duplicate credentials must be in

[48]

4

1 the hands of the Secretary-Treasurer at least  
2 fifteen days prior to the meeting of the con-  
3 vention. No local union shall be entitled to  
4 representation in the convention which has not  
5 complied with the Constitution of the Federa-  
6 tion. All proxy credential certificates must be  
7 sent direct to the delegates named thereon, and  
8 the duplicate certificates to the Secretary-Treas-

9 urer at headquarters fifteen days prior to the  
10 meeting of the biennial convention.

11 Sec. 5. Delegates representing a majority  
12 of the unions comprising the Federation shall  
13 constitute a quorum.

14 Sec. 6. Ladies' Auxiliaries of the Western  
15 Federation of Miners shall be entitled to one  
16 delegate with one vote for each auxiliary in  
17 good standing and transportation expenses for  
18 said delegate shall be paid by the Federation.

#### Pay of Delegates.

19 Sec. 7. The pay of each delegate to the bi-  
20 ennial convention shall not be less than \$5.00  
21 per day, which shall be paid by the union he  
22 represents.

23 The Federation shall pay the transportation  
24 expense of one delegate from each union in  
25 good standing. Any union electing more than  
26 one delegate shall pay transportation expenses  
27 on all delegates elected above that number.  
28 Secretaries of all local unions shall insert on  
29 credential card the name of delegate entitled  
30 to mileage at headquarters.

#### Article III.

##### Nomination and Election of Officers.

31 Section 1. The officers of the Federation  
32 shall consist of the President, Vice-President,  
33 Secretary-Treasurer, and four other Executive  
34 Board members, all of whom shall be elected  
35 by a vote of the membership.

1    Sec. 2. The call, with blanks for nomina-  
2 tions, shall be issued by the Secretary-Treas-  
3 urer on the first day of March in each even  
4 numbered year. Each local may nominate one  
5 candidate for each office, but the name of no  
6 candidate shall be placed on the ballot unless  
7 nominated by at least five locals.

8    Sec. 3. The returns of the nominations  
9 must be in the hands of the Secretary-Treas-  
10 urer of the Western Federation of Miners not  
11 later than the 15th day of April; provided, that  
12 any local that cannot be reached by mail may  
13 use telegraph or other means of communica-  
14 tion.

15    Sec. 4. The Secretary-Treasurer shall im-  
16 mediately notify each nominee of his nomina-  
17 tion, and his acceptance, together with a state-  
18 ment certifying to the eligibility of the nom-  
19 inee for the office for which he is nominated  
20 according to the provisions of this Constitution,  
21 must be in the hands of the Secretary-Treas-  
22 urer not later than May 10th.

23    Sec. 5. The Secretary-Treasurer shall send  
24 to each local union a sufficient number of bal-  
25 lots for the members thereof on which shall be  
26 printed in full the names of all eligible candi-  
27 dates. The voting shall take place at the regu-  
28 lar June election of that year.

29    Sec. 6. The Secretaries of the local unions  
30 shall immediately after election send the bal-  
31 lots and returns of the election to headquar-  
32 ters, said returns to be signed by the judges of

33 election, countersigned by the Secretary and  
34 bear the seal of the local union. The returns  
35 shall be sent to headquarters in a special en-  
36 velope provided by headquarters on which  
37 shall be printed the words "Election Returns,"  
38 these returns and the ballots to be held intact  
39 until the convening of the Convention.

40 Sec. 7. At the Convention a committee of  
[50] 6

1 three shall be elected to canvass the returns,  
2 the ballots to be held intact until the close of  
3 the Convention, after which, if no contest is  
4 made, these ballots shall be destroyed.

5 Sec. 8. For the offices of President, Vice-  
6 President and Secretary-Treasurer the candi-  
7 dates receiving the highest number of votes  
8 for each of those respective offices shall be  
9 elected, and the four candidates for Executive  
10 Board members receiving the four highest  
11 number of votes shall be declared elected.

12 Sec. 9. All officers elected to be installed  
13 at the Convention or, if absent, as soon there-  
14 after as possible, and they shall take office on  
15 the 1st day of September following.

16 Sec. 10. Delegates to the American Feder-  
17 ation of Labor Convention shall be elected an-  
18 nually, according to the same provisions for  
19 the election of officers in the biennial election.

20 Sec. 11. The ..... candidates receiv-  
21 ing the ..... highest number of votes shall  
22 be declared elected.

23 Sec. 12. The ..... candidates receiv-



24 ing the next . . . . . highest number of votes  
25 shall be declared alternates.

26 Sec. 13. Delegates to the American Fed-  
27 eration of Labor shall receive the same pay as  
28 Delegates to the Western Federation of Miners'  
29 Convention.

30 Sec. 14. To be eligible to any elective  
31 office, or Delegate to the American Federation  
32 of Labor Convention, the same qualification  
33 shall be required as those provided in this  
34 Constitution for Delegates to the Western Fed-  
35 eration of Miners' Convention.

#### Recall of Officers.

36 Sec. 15. On petition for the recall of an  
37 official of the Western Federation of Miners  
38 signed by not less than ten per cent of the

7

[51]

1 membership of the Federation in good stand-  
2 ing from not less than ten local unions of the  
3 Western Federation of Miners, it shall be the  
4 imperative duty of the Executive Board to  
5 call for a referendum vote of the entire mem-  
6 bership in the manner provided for in Section  
7 10, Article IV.

### ARTICLE IV.

#### Duties of Officers.

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#### Duties of President.

8 Section 1. It is the duty of the President to  
9 preside at all meetings of the Federation, pre-  
10 serve order, enforce the Constitution and watch  
11 vigilantly over the interests and affairs of the

12 Federation. In this he shall be assisted by all  
13 of the officers of the Federation. He shall have  
14 the right to vote at the election of officers, and  
15 when the members are equally divided he shall  
16 have the deciding vote on the question under  
17 consideration. He shall sign all orders drawn  
18 by the Secretary-Treasury, in compliance with  
19 a vote of the majority at any session of the  
20 Executive Board. He shall, with the approval  
21 of the Executive Board, fill all vacancies occur-  
22 ring in the Executive Board, or in the offices  
23 of Vice-President and Secretary-Treasurer. He  
24 may, with the approval of the Executive Board,  
25 appoint such organizers as the condition of the  
26 Federation may justify. Said organizers shall  
27 at all times act under the instructions of the  
28 President, and they shall receive not less than  
29 \$100.00 per month for such time as they are  
30 actually employed, together with transporta-  
31 tion expenses, and they shall report to the of-  
32 fice of the Federation in writing at least once  
33 each week, while in the employ of the Federa-  
34 tion as organizers. The President shall visit  
35 each district once each year, and visit as many  
36 unions as the conditions of the Federation will

8.

[52]

1 permit; and he may also examine the books of  
2 any union he visits, provided he has time so  
3 to do, in order to ascertain if each union is  
4 paying its share of the maintenance of the  
5 Federation. He shall communicate with persons

6 living in places where the Federation does not  
7 exist, and have them organized, if possible. He  
8 may convene the Executive Board when, in his  
9 opinion, the affairs of the Federation will jus-  
10 tify the same; and he may, with the approval of  
11 the Executive Board, call an extra convention  
12 of the Federation, and he shall, on the written  
13 request of six members of the Executive Board  
14 or on written request of ten unions having a  
15 combined membership of 7,500, call an extra  
16 convention of the Federation. He shall be and  
17 he is hereby constituted the trustee to sell,  
18 transfer or encumber in any manner and to  
19 any extent that he deems for the best interests  
20 of the Federation, any and all real and per-  
21 sonal property, except the funds of the Western  
22 Federation of Miners, with the concurrence  
23 and under the direction of the Executive Board  
24 of the Federation, or a convention duly called  
25 and assembled, and he shall execute all such  
26 documents in manner following: The Western  
27 Federation of Miners, by . . . . ., Trustee.  
28 He shall submit a complete report of his work  
29 during the term of his office to each conven-  
30 tion, and make such recommendations as in  
31 his judgment will advance the interests of the  
32 organization. The President shall have the  
33 power, with the consent of the Executive  
34 Board, to revoke the charter of or penalize any  
35 local union for violation of the Constitution or  
36 By-Laws, or proven treachery to the principles  
37 of the Western Federation of Miners. He shall

38 receive \$5.00 per day for his services, besides  
39 such an additional amount as may be neces-  
40 sary to defray his transportation and other  
41 expenses. [53]

## 9.

## Duties of Vice-President.

1 Sec. 2. It is the duty of the Vice-President  
2 to assist the President to preserve order at  
3 all meetings and assist him in the discharge  
4 of his duties; preside during his absence, and  
5 perform the duties devolving upon the Presi-  
6 dent; and in case of vacancy occurring in the  
7 office of President, he shall ascend to the  
8 Presidency and act as such for the unexpired  
9 term.

## Duties of Secretary-Treasurer.

10 Sec. 3. It shall be the duty of the Secre-  
11 tary-Treasurer to attend all conventions of the  
12 Western Federation of Miners, and bring there-  
13 to all the necessary books, papers, and docu-  
14 ments pertaining to his office, and keep a  
15 proper and correct record of the proceedings  
16 of the convention; read all petitions, resolu-  
17 tions and communications, not in charge of a  
18 special committee, which may be submitted to  
19 the Federation, file and safely keep, unless  
20 otherwise ordered, all papers or documents  
21 which have been before the convention. At each  
22 biennial meeting of the convention he shall  
23 submit a complete report of the receipts and  
24 disbursements of the Federation for the pre-



25 ceding year, number of unions organized, num-  
26 ber in good standing and the number of unions  
27 disbanded, if any, and the cause thereof. If  
28 ordered by the convention, he shall cause to be  
29 printed duly authenticated copies of the pro-  
30 ceedings of the convention and furnish each  
31 local union with a copy thereof. He shall pre-  
32 pare, sign and seal all charters and such other  
33 papers and documents as may emanate from  
34 the Western Federation of Miners, and which  
35 are required to be duly authenticated. He  
36 shall, at the end of each quarter, send a report  
37 to each local union, showing the receipts, and  
38 the dates thereof, of all moneys received from

10.

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1 the local unions for the preceding quarter. All  
2 moneys coming into his hands belonging to the  
3 Federation shall be deposited, at least twice a  
4 month, in some solvent bank or banks, and  
5 shall only be drawn out to pay indebtedness  
6 arising out of the due conducting of the busi-  
7 ness of the Federation, and then only after  
8 a bill shall have been first duly presented by  
9 the creditor, when in payment thereof a check  
10 shall be drawn and signed by him, after which  
11 he shall present it, together with the bill, to  
12 the President for his counter-signature. He  
13 shall have charge of all the funds and property  
14 of the Western Federation of Miners, and shall  
15 keep a careful and accurate account thereof, as  
16 well as an accurate account of all funds arising  
17 out of the relation of the Federation with the

18 local unions, and whenever money is received  
19 from a local union, a receipt therefor must be  
20 given or mailed to the sender. He shall promptly  
21 attend to all correspondence pertaining to his  
22 office, and within the first week in May of each  
23 year he shall send to each union which is not  
24 indebted to the Federation for moneys, which it  
25 should have paid under the Constitution, dupli-  
26 cate credentials for delegates. Upon the expi-  
27 ration of his term of office or retirement from  
28 any cause he shall faithfully account for all  
29 money or property coming into his hands and  
30 all funds or property remaining in his hands or  
31 not paid out or disposed of in the due course of  
32 the discharge of his official duties, it shall be  
33 accounted for and turned over to his successor  
34 or such other person who may be duly author-  
35 ized to take into his custody the funds or prop-  
36 erty of the Federation. For the honest and faith-  
37 ful discharge of his duties he shall give a bond  
38 in the sum of not less than \$30,000, the bond so  
39 given to be approved by the Executive Board  
40 and kept in their custody. For his services he  
41 shall receive the sum of one hundred and fifty

11.

[55]

1 (150) dollars per month, which may be paid  
2 monthly out of the funds of the Federation, in  
3 the same manner as is provided for the pay-  
4 ment of other bills and indebtedness. He shall  
5 issue a supplement to his quarterly report of  
6 all members suspended, fined or expelled dur-  
7 ing the quarter.

Executive Board.

8    Sec. 4. The Executive Board shall consti-  
9    tute the Federation board of arbitration and  
10   conciliation, and between conventions have full  
11   power to direct the workings of the Federa-  
12   tion. No representative of a union shall be en-  
13   titled to a hearing before the Executive Board  
14   without proper credentials, with the seal of  
15   the union attached thereto.

16   Sec. 5. The Executive Board shall be con-  
17   vened by the President, or by the Secretary-  
18   Treasurer, at the request of three members of  
19   the Board.

20   Sec. 6. The jurisdiction of the Western  
21   Federation of Miners shall cover the United  
22   States and its territories, and the Dominion of  
23   Canada.

24   Sec. 7. Each member of the Executive  
25   Board shall act as an organizer and he shall  
26   also be required to make such investigation  
27   relative to the condition of each local union  
28   as in his judgment may be necessary, and make  
29   a report thereof to the President of the Feder-  
30   ation on or before the 10th day of June of each  
31   year. In case of trouble arising in the juris-  
32   diction of a union, the member shall be sum-  
33   moned and given full charge in the direction  
34   or negotiations until the arrival of the Presi-  
35   dent, who shall be summoned if necessary. For  
36   all necessary services rendered in the discharge  
37   of his duties, he shall receive the sum of \$4.00



38 per day and legitimate expenses for such time  
39 as he is actually employed, together with his  
12. [56]

1 transportation expenses, and he shall at all  
2 times be subject to the orders of the President.

3 Sec. 8. The Executive Board members shall  
4 be placed on continuous pay, and kept in the  
5 field constantly, and be at all times under  
6 the direction of the President, who shall direct  
7 their actions in the field, and shall require  
8 each member to report weekly the result of his  
9 work, and to audit the books of all locals he  
10 may visit and make a thorough report on con-  
11 dition of same.

12 Sec. 9. All members of the Executive  
13 Board, and organizers employed by the Fed-  
14 eration shall submit monthly reports for publi-  
15 cation in the Miners' Magazine, these reports  
16 to contain matters of interest to the general  
17 organization.

18 Sec. 10. The Executive Board shall, on de-  
19 mand of ten or more locals, submit all such  
20 matters pertaining to such proposition to a ref-  
21 erendum vote through the Secretary-Treasurer,  
22 not later than fifteen days after receipt thereof;  
23 provided that no such referendum shall be sub-  
24 mitted which is a reversal of a former refer-  
25 endum within one year. The majority of such  
26 vote shall be binding on all parties concerned.

27 Sec. 11. The Executive Board members  
28 shall be delegates at large to the convention



29 and entitled to the same privileges as other  
30 delegates at the convention.

## ARTICLE V.

### Auditors.

31 Section 1. The President shall appoint, with  
32 the approval of the Executive Board, one or  
33 more auditors whose duty it shall be to audit  
34 the books and accounts of all unions of the  
35 Federation, and to render to the President a  
36 report of his findings in each case.

37 Sec. 2. Such auditor shall be at all times

13.

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1 under the direction of the President. He must  
2 be a competent bookkeeper and a member of  
3 the Federation in good standing. It shall also  
4 be his duty to collect for the use of the Fed-  
5 eration such statistics as may be determined  
6 by the President and Executive Board and  
7 whenever possible solicit subscriptions and  
8 advertising for the Miners' Magazine.

## ARTICLE VI.

### Revenues and Disbursements.

9 Section 1. The revenue of the Federation  
10 shall be derived from a charter fee of ten dol-  
11 lars and a per capita tax of twenty-five cents  
12 per month on all monthly dues collected in  
13 accordance with the stamp system, to be paid  
14 from the general fund of each union through  
15 the purchase of said stamps in advance, and  
16 in case of emergency such assessments, as in  
17 the judgment of the Executive Board or con-

18 vention may be necessary, the same shall be  
19 paid from the general fund, and based on the  
20 preceding monthly report previous to such as-  
21 sessment.

22 Sec. 2. Any union failing to purchase the  
23 required number of per capita and assessment  
24 stamps to stamp all membership cards, in com-  
25 pliance with the stamp system, shall be penal-  
26 ized as prescribed by Section 1, Article X.

## ARTICLE VII.

### Official Journal.

27 Section 1. The Journal shall be issued  
28 weekly under the direct supervision of the  
29 General Executive Board. The Executive Board  
30 shall have the power to appoint the Editor of  
31 the Miners' Magazine.

32 Sec. 2. The pages of the official journal  
33 shall be open to all officers and members of  
34 the organization for the discussion of social

14.

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1 affairs, industrial, economic and political ques-  
2 tions, or any other questions pertaining to the  
3 interest of the working-class. It shall endeavor  
4 to enlighten the membership of the organiza-  
5 tion on the cost of production of the various  
6 kinds of metals; viz.: iron, steel, lead, zinc  
7 and copper, and its market value. It shall  
8 endeavor to give statistics showing what wages  
9 are being paid to the miners, millmen and  
10 smeltermen and steel workers in the different  
11 states and territories in the jurisdiction of the  
12 Western Federation of Miners. It further shall

13 endeavor to demonstrate what relation there  
14 exists between one set of workers and another  
15 set of workers, especially those workers who  
16 are engaged in the production of coal, iron,  
17 steel, lead, zinc and copper, and other precious  
18 metals, and it shall at all times advocate the  
19 principles of Industrial Unionism.

## ARTICLE VIII.

### Strikes and Adjustments.

20 Section 1. It shall be unlawful for any  
21 union to enter upon a strike unless ordered  
22 by two-thirds of the votes cast upon the ques-  
23 tion; such questions shall be decided by refer-  
24 endum vote, notice of such referendum to be  
25 posted three days in advance, vote to be by  
26 ballot and polls to be open for not less than  
27 eight hours. No call shall be made for a  
28 referendum vote on a strike until after having  
29 received the approval of the Executive Board  
30 of the W. F. M.

31 Sec. 2. In case of a strike being in progress  
32 in the jurisdiction of the Federation, where a  
33 union or unions of the Federation is on strike,  
34 regularly ordered by the union or unions and  
35 the Executive Board, and in the opinion of the  
36 President and the Executive Board it becomes  
37 necessary to call out any other union or unions

15.

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1 in order to carry the strike to a successful  
2 termination, that they shall have full power to  
3 do so.

4 Sec. 3. Whenever a strike shall be approved

5 by the Executive Board and local union or  
6 unions as authorized by Section 1 of Article  
7 VIII, the President shall appoint, with the con-  
8 sent of the Executive Board, a representative  
9 of the Federation to take charge of the funds  
10 furnished by the Federation for the relief of  
11 members involved in said strike or lockout.  
12 The representative so chosen shall file a bond  
13 with the Executive Board, subject to its ap-  
14 proval, in such sum or sums as the Board may  
15 determine, he shall make complete itemized  
16 returns of all receipts and expenditures, in-  
17 cluding a list of the persons aided to the Sec-  
18 retary-Treasurer and through him to the Ex-  
19 ecutive Board.

20 Sec. 4. Local unions or groups of local  
21 unions may enter into wage agreements for a  
22 specified time, providing such agreements have  
23 the approval of the Executive Board. Nego-  
24 tiations for agreements must be made between  
25 the representative of the local or locals affect-  
26 ed, and the employers, with at least one mem-  
27 ber of the Executive Board, or representative  
28 of the general organization present.

## ARTICLE IX.

### New Unions.

29 Section 1. Whenever twenty or more non-  
30 union or union men shall be so situated within  
31 the jurisdiction of a union that the attendance  
32 at the meetings of such union would be incon-  
33 venient, they may apply to the President of the  
34 Federation for a charter. Should he consider



35 their application a proper one for the advance-  
36 ment, both of the interests of the applicants and  
37 the Federation, a charter shall be granted them

16.

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1 and their territorial jurisdiction defined. If  
2 such applicants are members they must apply  
3 to their respective unions for transfer cards,  
4 through the secretary-elect. Any union refus-  
5 ing to issue such cards shall be subject to a  
6 fine, the amount of which shall be determined  
7 by the Executive Board.

## ARTICLE X.

### Penalties.

8 Section 1. Any union failing to make cor-  
9 rect monthly reports to the Secretary-Treas-  
10 urer of the Federation, thereby evading its  
11 just share of the per capita tax and assess-  
12 ments, shall be fined for each offense a sum  
13 equal to double the amount so evaded.

14 Sec. 2. Any local union whose Secretary  
15 fails to place the required number of per capita  
16 or general assessment stamps upon a mem-  
17 ber's card shall be subject to a fine of one dol-  
18 lar for each stamp not so placed.

19 Sec. 3. Any local union whose Secretary  
20 fails to forward to the Secretary-Treasurer of  
21 the Federation properly filled out monthly and  
22 annual reports within twenty days after the  
23 same become due, shall be advertised in the  
24 Miners' Magazine. This section shall not apply  
25 to local unions in Alaska.

## ARTICLE XI.

## Duties and Privileges of Members.

26 Section 1. Each member at initiation shall  
27 pledge himself to support the Constitution of  
28 the Federation and obey all lawful orders of  
29 the Executive Board, in addition to the obli-  
30 gation required by the union of which he be-  
31 comes a member.

32 Sec. 2. If a member of a union commits an  
33 offense in violation of his obligation or against  
34 the good and welfare of the Federation, his

17

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1 union or any union of the Western Federation  
2 of Miners, the general officers, members, of the  
3 Executive Board, or any members of the Fed-  
4 eration, or in violation of the Constitution and  
5 By-Laws of the Western Federation of Miners,  
6 or affiliated unions, he shall be entitled to an  
7 impartial trial by his local union as hereinafter  
8 provided. The offense of which he is charged  
9 shall be presented in writing to his local union  
10 by the members making the charge who at the  
11 time must be a member of the Western Feder-  
12 ation of Miners in good standing, said charges  
13 shall be read by the Recording Secretary of  
14 the union, at the first regular meeting of the  
15 union after the paper containing the charges  
16 are received. When said charges are read the  
17 President shall, without discussion, appoint an  
18 impartial committee of five members of the  
19 union in good standing to investigate such

20 charges whose duty it shall be to present a  
21 copy of the charges to the member against  
22 whom the charges have been preferred, and  
23 notify him when to appear before said com-  
24 mittee for trial. Similar notice shall be served  
25 upon the member preferring the charges. This  
26 committee shall elect a chairman and secretary  
27 before proceeding to hear evidence for the  
28 plaintiff and defendant and keep a correct copy  
29 of the charges and all testimony presented and  
30 submit the same to the union with their writ-  
31 ten report signed by all members of the com-  
32 mittee. The union shall either adopt or reject  
33 the report of the committee. Either the plain-  
34 tiff or defendant shall have the right to appeal  
35 to the Executive Board of the Western Feder-  
36 ation of Miners and from that body to the en-  
37 suing convention. The Executive Board shall  
38 receive no evidence in the case except the  
39 records of the committee nor permit any wit-  
40 ness to appear for the plaintiff or defendant.  
41 Should the union fail to preserve the records

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18.

1 of the investigation as returned by the com-  
2 mittee or refuse to surrender the same to the  
3 Executive Board, upon request of the Secre-  
4 tary-Treasurer it shall be subject to whatever  
5 penalty the Executive Board may deem neces-  
6 sary to impose upon it.

7 Sec. 3. The convention shall have the power  
8 to bring any official of the Federation dele-

9 gate, or any member of the Federation before the  
10 bar of the convention for trial. The conven-  
11 tion shall choose its method of procedure,  
12 have full power to record and enforce its  
13 verdict. From its decision there shall be no  
14 appeal.

15 Sec. 4. Any one acting as a strike-breaker  
16 or scab during a strike in the jurisdiction of  
17 the Western Federation of Miners, who pro-  
18 fesses to have seen the error of his ways, may  
19 be placed on probation by the local union in-  
20 volved, or by any local union in whose juris-  
21 diction he may be employed when such charges  
22 are preferred against him, provided the local  
23 involved grants permission; provided, that  
24 this shall in no way apply to any man who  
25 has been a deputy sheriff or gun man in the  
26 employ of any corporation. Such men shall  
27 remain on probation until such time as the  
28 local union, in whose jurisdiction he is work-  
29 ing out his probation, shall declare his of-  
30 fense expiated in full by good work for the  
31 cause.

32 In case of a union being defunct, the Execu-  
33 tive Officers of the Western Federation of  
34 Miners shall be governed by this provision.  
35 The card issued on probation shall be marked  
36 "probation card."

37 Sec. 5. Whenever any member or members  
38 of a local union shall be discharged for actively  
39 participating in the affairs of the local union,



40 or of the Western Federation of Miners, or on  
41 account of his race, color, religious or political

19

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1 beliefs, it shall be the duty of the local union  
2 to investigate fully and use all means in their  
3 power to have such member or members re-  
4 instated in their former positions.

5 Sec. 6. Whenever any local or district union  
6 shall enter into any agreement or contract with  
7 their employers, the principles embodied in  
8 Section 5 of this article shall be made a part  
9 of such agreement or contract.

10 Sec. 7. Whenever a member of a local  
11 union shall become a foreman, shift boss or  
12 assume a position that cannot be termed as  
13 part of the mining industry, he shall lose all  
14 rights to a voice, vote or seat in the meetings  
15 of his local union, but may continue his mem-  
16 bership as a beneficiary member, or upon ap-  
17 plication to the Financial Secretary he may  
18 be granted a withdrawal card.

## ARTICLE XII.

### Legislation.

19 Section 1. The initiative and referendum  
20 shall govern all legislation. Whenever a local  
21 in good standing, delegate or delegation in con-  
22 vention shall, by resolution, offer an amend-  
23 ment to the Constitution and By-Laws, the same  
24 shall be considered in the biennial conven-  
25 tion, and by that body submitted to the mem-  
26 bers of the Western Federation of Miners, who

27 shall vote upon the same within sixty days.

28 All locals voting on a referendum shall use—

29 First: A blank record sheet for the names  
30 of all members voting;

31 Second: Printed ballots with the questions  
32 fully stated upon them, with the spaces, so as  
33 to vote for or against any question:

34 Third: That envelopes containing record  
35 sheets with names, report blanks, with totals  
36 of votes cast for or against all questions,  
37 should contain no other matter, and the word

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20

1 “referendum” should be marked upon the en-  
2 velope, and the same shall not be opened until  
3 the date set for compiling the votes of all  
4 locals.

5 After having received the approval of a ma-  
6 jority of the members voting upon the ques-  
7 tion, it shall receive the signature of the Presi-  
8 dent and Secretary-Treasurer, and becomes a  
9 part of the organic law. The Secretary-Treas-  
10 urer shall canvass the vote on all referendum  
11 questions and make up a return sheet, setting  
12 forth the vote of each local, and furnish all  
13 locals with a copy of the same.

### ARTICLE XIII.

#### Emergencies.

14 Section 1. Whenever a vital circumstance,  
15 not otherwise provided for, arises and the same  
16 cannot in justice be deferred until the assem-  
17 bling of the convention, the Executive Board  
18 may submit any important question so arising

19 to a referendum vote of the entire member-  
20 ship in good standing, in the manner described  
21 in Section 1, Article XII. The majority of such  
22 vote to govern in all cases submitted.

23 Sec. 2. Whenever a proposition of vital im-  
24 portance presents itself to the membership of  
25 the W. F. M., not otherwise provided for, the  
26 Executive Board shall, on demand of ten or  
27 more locals, submit all such matters pertaining  
28 to such proposition to a referendum vote  
29 through the Secretary-Treasurer, not later than  
30 fifteen days after receipt thereof; provided  
31 that no such referendum shall be submitted  
32 which is a reversal of a former referendum  
33 within one year. The majority of such vote  
34 shall be binding on all parties concerned.

35 Sec. 3. This constitution shall not be  
36 amended except by a majority vote of all dele-  
37 gates assembled in convention or by initiative

21

[65]

1 petition of at least ten locals of this organiza-  
2 tion, representing at least five per cent of the  
3 whole membership, the same to be approved  
4 by referendum vote as described in Section 1,  
5 Article XII.

22.

[66]

## ARTICLE 1.

### By-Laws.

#### Receipts and Accounts.

1. Sec. 1. Local unions shall preserve all re-  
2 ceipts issued by the Secretary-Treasurer and  
3 have the same presented to the finance com-

4 mittee at the biennial convention, through their  
5 delegates to the convention, in order to compare  
6 them with the stub book of the Secretary-Treas-  
7 urer.

#### Password.

8     Sec. 2. The President shall send to each union  
9 which has paid per capita tax and is not ninety  
10 days in arrears for assessments, a quarterly pass-  
11 word.

#### Membership Card.

12     Sec. 3. Throughout the jurisdiction of the  
13 Western Federation of Miners a uniform mem-  
14 bership card shall be used. The same shall be  
15 the stamp card system, approved by the Tenth  
16 and amended by the Sixteenth Annual Conven-  
17 tion; the form and style of said cards shall pro-  
18 vide a space wherein local Secretaries shall re-  
19 cord the amount of sick benefits received by each  
20 member. Said card shall be designed by the  
21 Executive Officers of the Western Federation of  
22 Miners.

#### Withdrawal Cards.

23     Sec. 4. If a member takes a withdrawal card  
24 from the union to which he belongs and [67]

#### 23

1 goes to work as specified in Section 1, Article I, of  
2 the Constitution, where there is a union of the  
3 Federation, he shall at once deposit his card in  
4 that union; failing to do so, he shall be held for  
5 dues and assessments from the time he starts to  
6 work by the union within whose jurisdiction he  
7 may be employed.



8     Sec. 5. No withdrawal card shall be issued to  
9 any member of the W. F. M. except such mem-  
10 bers who are actually engaged in some occupa-  
11 tion not included in the jurisdiction of the W.  
12 F. M., or one who permanently retires from the  
13 occupation specified in Article I of the Constitu-  
14 tion. All dues and assessments must be paid for  
15 the month in which the withdrawal card is is-  
16 sued.

17     Sec. 6. Local unions of the Federation shall  
18 have full jurisdiction over all members who  
19 are permanent residents of their local districts,  
20 subject, however, to the right of appeal de-  
21 scribed in Section 2, Article XI, of the Constitu-  
22 tion.

23     Sec. 7. Local unions shall have power to name  
24 the amount to be collected as a reinstatement fee  
25 from members six months or more in arrears for  
26 dues and assessments.

27     Sec. 8. Secretaries shall place due stamps on  
28 members' cards for back dues collected for re-  
29 instatement or otherwise.

#### Interchangeable Cards.

30     Sec. 9. Transfer cards and withdrawal cards  
31 issued by any chartered labor organization shall  
32 be accepted by local unions of the Western Fed-  
33 eration of Miners, subject to the rules and qualifi-  
34 cations governing members of such locals of the  
35 Western Federation of Miners.

#### Transfer.

36     Sec. 10. Any member leaving the jurisdiction  
37 of his union and going to work in the jurisdiction

1 of another union of the Federation shall im-  
2 mediately deposit his membership card with  
3 the Financial Secretary and pay up all arrear-  
4 ages. The Financial Secretary receiving the  
5 member's card shall immediately notify the  
6 union of which the member has a card, so that  
7 the member's account can be closed in the for-  
8 mer union; and the failure upon the part of  
9 the Financial Secretary to notify the union  
10 within fifteen days shall subject him to a fine  
11 of not less than one dollar nor more than five.  
12 All arrearages collected (other than local *as-*  
13 assessments) shall belong to the union receiv-  
14 ing the membership card and all advance dues  
15 which may have been paid shall be remitted;  
16 provided, however, that no advance dues shall  
17 be requested for the month in which transfer  
18 is made. Any member in good standing trans-  
19 ferring from one local to another, upon signing  
20 the Constitution, shall be entitled to all the  
21 rights and benefits of that local.

22 Sec. 11. Any member working within the  
23 jurisdiction of a local union and refusing to de-  
24 posit his card, shall be subject to a fine of not  
25 less than \$1.00 nor more than \$50.00, said fine  
26 to be left to the discretion of the local union.

27 Sec. 12. When a member of a local union  
28 goes to work within the jurisdiction of another  
29 and refuses to deposit his card, it shall be its  
30 duty to place a fine against him and suspend  
31 him from any benefits whatsoever. Any Secre-

32 tary accepting dues from a member who is in  
33 the jurisdiction of another local shall be sub-  
34 ject to a fine of not less than \$1.00 nor more  
35 than \$5.00.

## ARTICLE II.

### Supplies.

36 Section 1. All withdrawal and notification  
37 cards of the Federation shall be made of uni-  
38 form size, with stub attachment. [69]

### 25

1 Sec. 2. The Federation has adopted, for  
2 the sake of uniformity, the following supplies,  
3 which must be procured from the Secretary-  
4 Treasurer, except in the Dominion of Canada,  
5 where blanks shall be printed to conform with  
6 the laws and usages of that country, as well  
7 as in conformity with this Constitution, and  
8 that the same may be printed in the Dominion  
9 of Canada, viz.: Constitutions, withdrawal  
10 cards, notification cards, quarterly report  
11 blanks, blank bonds for officers of unions, ap-  
12 plication blanks, ledger, day book and cash  
13 book, and that it be imperative on the part of  
14 all locals to use this system of bookkeeping.  
15 Provided, all membership cards and the auth-  
16 orized metal emblem of the Federation shall be  
17 procured from the Secretary-Treasurer of the  
18 Federation.

## ARTICLE III.

### Nominations, Elections and Installations of Officers.

19 Sec. 1. Nominations of officers in local

20 unions shall be made from the floor. Nomina-  
21 tions shall remain open for three regular meet-  
22 ings prior to election, when each Recording  
23 Secretary shall, within ten days thereafter,  
24 forward the names of all officers elected to the  
25 Secretary-Treasurer of the Federation, who  
26 shall compile a directory of the same and  
27 forward a copy of these directories to each  
28 local union. It shall be optional with each  
29 local union as to whether it shall hold annual  
30 or semi-annual elections. Installation of offi-  
31 cers for local unions shall not take place until  
32 the first meeting in July or in January.

#### Balloting.

33 Sec. 2. All unions shall, on the demand of  
34 five or more members in good standing, take a  
[70] 26

1 secret ballot upon any question coming before  
2 the union.

### ARTICLE IV.

#### Jurisdiction.

3 Section 1. The jurisdiction of the Federa-  
4 tion shall extend to all states and territories  
5 and the Dominion of Canada as described in  
6 Section 6, Article IV, of the Constitution.

#### District Unions.

7 Sec. 2. Where a majority of members vot-  
8 ing in a district or state deem it necessary,  
9 they may organize a district or state union for  
10 the purpose of doing business for the district  
11 or state. Such unions shall apply to the Fed-  
12 eration for, and receive a special charter, said



13 charter to be issued at cost. Such district or  
14 state union shall be subordinate to the Feder-  
15 ation, but shall be a higher authority than the  
16 local unions of the Federation in its jurisdic-  
17 tion. All local unions of the Federation with-  
18 in the jurisdiction of a district or state union  
19 shall be a member of said district or state  
20 union and recognize the authority of same.

#### Defunct Unions.

21 Sec. 3. When any local union has a mem-  
22 bership of less than ten members in good  
23 standing, the charter of such local may be con-  
24 sidered defunct, and surrender its charter and  
25 books to the Federation; and any member of  
26 the said union becoming desirous of joining  
27 another union of the Western Federation of  
28 Miners shall, by paying the dues and assess-  
29 ments he owed in his former union up to the  
30 time the books were turned over to the Fed-  
31 eration, be transferred to the union to which  
32 he makes application. [71]

#### 27

1 Sec. 4. The property of defunct unions shall  
2 be held in trust by the Federation, and where  
3 local unions are reorganized within a period  
4 of one year, comprising of twenty or more  
5 members of the former local the property so  
6 held in trust shall be returned to the reorgan-  
7 ized local, but when the locals are reorganized  
8 with less than twenty members of the former  
9 local, they shall have no claim on the property  
10 of the defunct union. At the expiration of one

11 year from the date of the local going defunct,  
12 the property shall cease to be held in trust and  
13 become the property of the Federation.

14 Sec. 5. Where two or more locals are situ-  
15 ated in the same locality or district, and one or  
16 more locals become weakened by loss of mem-  
17 bers or otherwise, they may, by a majority  
18 vote of each local interested, consolidate. All  
19 money and property shall belong to the union  
20 so consolidated, except the charter or charters  
21 of the locals ceasing to exist, said charters to  
22 be forwarded to headquarters immediately.  
23 The unions so consolidated shall be held for  
24 all existing indebtedness.

#### ARTICLE V.

25 Section 1. Each local Financial Secretary  
26 must keep a record of all members that are  
27 expelled from local unions, and when a person  
28 is proposed for admittance into any local of  
29 the Western Federation of Miners, the Finan-  
30 cial Secretary must first look at the list re-  
31 ported by the Secretary-Treasurer of the Fed-  
32 eration and then report to his union the result  
33 of his investigation.

#### Correspondence.

34 Sec. 2. Each Secretary of the local union  
35 shall be required to keep a copy of all cor-  
36 respondence in a copying book suitable for that  
37 purpose. [72]

## ARTICLE VI.

## Fines and Penalties.

1 Section 1. Any member who is under the  
2 influence of liquor, appearing as a delegate at  
3 any convention of the Western Federation of  
4 Miners, or failing to answer roll call without  
5 being excused by the President, shall be fined  
6 for the first offense the sum of one dollar; for  
7 the second offense the sum of two dollars; for  
8 the third offense the sum of five dollars, and  
9 any delegate or delegates who shall have been  
10 guilty of such an offense shall be censured and  
11 reprimanded by the President, and the union  
12 to which he or they may belong shall be noti-  
13 fied of his action.

---

ORDER OF BUSINESS.

1. Call the meeting to order.
2. Warden, secure the door.
3. Presentation of credentials.
4. Appointment of committees.
5. Roll call.
6. Reading of minutes of previous meeting.
7. Communications and correspondence.
8. Bills.
9. Reports of officers.
10. Reports of standing committees.
11. Special committees.
12. Unfinished business.
13. New business.

14. Election of officers.
15. Good and welfare of the Federation.
16. Installation of officers.
17. Adjournment. [73]

## 29

## RULES OF ORDER.

1 During the continuance of the meeting si-  
2 lence must be observed, the officers and mem-  
3 bers retaining their respective seats, and no  
4 one leaving the room without permission of  
5 the President or Vice-President.

6 No member shall, by conversation or other-  
7 wise, interrupt the business of the Federation  
8 or refuse to obey the chair.

9 The President, while presiding, will state  
10 every question coming before the Federation,  
11 and immediately before putting it to a vote  
12 shall ask: "Are you ready for the question?"  
13 Should no member rise to speak, or by silence  
14 indicate their readiness, he shall rise to state  
15 the question, and after he has risen no member  
16 shall be permitted to speak upon it. He shall  
17 announce the result or decision of the Feder-  
18 ation upon all subjects.

19 Every member, when he speaks or offers a  
20 motion, shall rise and respectfully address the  
21 presiding officer. While speaking he shall con-  
22 fine himself to the subject under debate, avoid-  
23 ing all personalities and indecorous language,  
24 as well as any reflections upon the union or its  
25 members.

26 Should two or more members rise to speak



27 at the same time, the chair shall decide who is  
28 entitled to the floor.

29 No member shall disturb another in his  
30 speech unless to call him to order for words  
31 spoken.

32 If a member, while speaking, shall be called  
33 to order, at the request of the chair, he shall  
34 cease speaking and take his seat until the

30

[74]

1 question of order is determined, when, if per-  
2 mitted, he may again proceed.

3 No member shall speak more than once on  
4 the same question until all the members wish-  
5 ing to speak shall have had the opportunity to  
6 do so, nor more than twice without the per-  
7 mission of the chair.

8 When any communication, petition or mem-  
9 orial is presented, before it is read a brief  
10 statement of its contents shall be made by the  
11 introducer to the chair.

12 No motion shall be subject to action unless  
13 seconded and stated by the chair.

14 Any member may call for a division on a  
15 question when the sense will admit it.

16 When a question is before the Federation  
17 no motion shall be received unless to close, the  
18 previous question, to lay on the table, to post-  
19 pone indefinitely, to refer, to amend, and shall  
20 have precedence in the order herein arranged  
21 —the first three of which shall be decided  
22 without debate.

23 After any question, except one of indefinite

24 postponement or one the result of which the  
25 Federation cannot reverse, has been decided,  
26 any member who voted in the majority may, at  
27 the same meeting move a reconsideration  
28 thereof.

29 No amendments shall be received except  
30 they are in writing.

31 All questions not provided for by the Con-  
32 stitution, By-Laws, Rules of Order, or by the  
33 General Laws of the Federation, shall be de-  
34 termined by a majority of the members at a  
35 regular meeting.

36 These rules may be suspended for a special  
37 purpose by a vote of two-thirds of the mem-  
38 bers present.

39 Roberts' Rules of Order shall govern the  
40 proceedings of the Federation in the absence  
41 of any rules not herein provided for.

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**Exhibit "E" to Answer—Amended Complaint,  
Western Federation of Miners et al., v. Scahill  
et al.**

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County of  
Silver Bow.*

**WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization, Association of Persons  
With Its Headquarters in the City and County  
of Denver, State of Colorado, and CHARLES  
H. MOYER, President of the Western Fed-  
eration of Miners, a Voluntary Organization  
and Association of Persons With Its Head-  
quarters in the City and County of Denver  
and State of Colorado; GUY E. MILLER,  
and ED. O'BYRNE,**

**Plaintiffs,**

**vs.**

**MARTIN SCAHILL, PATRICK LEE, PATRICK  
O'NEILL, MIKE A. SULLIVAN, JAMES  
RYAN, JAMES WALSH and PATRICK  
QUIGLEY,**

**Defendants.**

**Amended Complaint.**

Plaintiffs complain of defendants, leave of court  
being had and obtained to file this Amended Com-  
plaint and for cause of action allege:

1. That the Western Federation of Miners is a  
voluntary organization of persons engaged in the  
mining, milling and reduction of ores and minerals,

and about the mining, milling and reduction of ores and minerals, with its headquarters in the City and County of Denver, in the State of Colorado; and that Chalers H. Moyer is the duly elected, qualified and acting president of said Western Federation of Miners; and that said Western Federation of Miners is made up of different local unions, or organizations, in different states and territories in the United States of America, the members of which local unions are members of the Western Federation of Miners; and that the said Western Federation of Miners issues to the different local unions which are parts of the Western Federation of Miners, a charter for the regulation and conduct of said different local unions, and has a constitution and by-laws therefor.

II. That The Butte Miners' Union is a corporation existing under [77] and by virtue of the laws of the State of Montana, the membership of which corporation is composed of persons engaged in mining, milling, smelting, and handling of ores and minerals and that the members of said Butte Miners' Union, a corporation are members of the Western Federation of Miners; and that on the 22d day of September, A. D. 1914, The Butte Miners' Union, a corporation, as aforesaid, and the members thereof, by and through its said members and officers, petitioned the said Western Federation of Miners, a voluntary association and organization, as aforesaid, for the issuance to said Butte Miners' Union of a charter, a copy of which petition is hereunto annexed, marked exhibit "A," and made a

part of this complaint; that thereafter, on the 3d day of October, 1914, under and by virtue of the constitution and by-laws of the Western Federation of Miners, a voluntary organization and association, as aforesaid, Western Federation of Miners issued to the Butte Miners' Union, a corporation, and its members, a charter, a copy of which said charter is hereunto annexed, marked exhibit "B," and made a part of this complaint, which said charter was accepted by the said Butte Miners' Union, a corporation and its members.

III. That there is a provision of the constitution of the Western Federation of Miners for the government of said Western Federation of Miners and the local unions belonging to said Western Federation of Miners and the membership thereof, as follows, to wit:

#### "AMENDMENT.

Amend by adding to the 'Duties of President,' in Art. 4, Sec. 1, after the word 'Miners', page 9, line 37:

The President shall have power on petition of ten per cent of the members in good standing in their respective locals making charges in writing against their local officers to take complete charge of the local's affairs, and if the charges are proven he shall call a special election within 30 days and place local's [78] affairs on a business basis before relinquishing to local's officials."

That The Butte Miners' Union, by and through the vote of its membership, at an election duly and regularly held, adopted the aforesaid provision of

the Constitution of the Western Federation of Miners as a part of the rules and regulations for the government of the Butte Miners' Union and membership thereof.

IV. That thereafter and on the 23d day of November, A. D. 1914, and in accordance with said provision of said constitution and by-laws hereinbefore set forth, charges in writing, a copy of which said charges is hereunto annexed, marked exhibit "C," and made a part of this Complaint were preferred against the officers of the Butte Miners' Union, a corporation, who are the defendants above named, to wit: Martin Scahill, President; Patrick Lee, Secretary-Treasurer; Patrick O'Neill, Recording Secretary; Mike A. Sullivan, James Ryan, James Walsh and Patrick Quigley, Trustees, and were presented to Chas. H. Moyer, President of the Western Federation of Miners, and Chas. H. Moyer, President of the Western Federation of Miners, was petitioned to take complete charge of the affairs of the Butte Miners' Union a corporation, in accordance with the aforesaid provisions of the constitution of the Western Federation of Miners.

IV-a. That the said charges hereinbefore set forth are signed by ten per cent (10%) of the membership of the Butte Miners' Union, a corporation, and that the said charges are based upon the conduct and actions of the defendants herein named, the said conduct and actions being that the said defendants have wilfully, unlawfully, wrongfully and without warrant of authority, lavishly, improvidently, and without due regard to the rights of the member-



ship of The Butte Miners' Union, a corporation, expended, paid out, and disposed of the money belonging to The Butte Miners' Union; and have failed and neglected and refused to properly account for the money so expended, [79] and have allowed and permitted persons not members in good standing of The Butte Miners' Union, a corporation, to participate in the meetings of The Butte Miners' Union, a corporation, to vote therein and to have a voice therein in the government and affairs of The Butte Miners' Union, a corporation; that they continually expended the money of The Butte Miners' Union for unnecessary purposes and have paid out, in this connection, unnecessary and exorbitant salaries to divers and sundry persons without due regard for the welfare and protection of the interests of the membership of The Butte Miners' Union, a corporation; that they have, by their acts, wrongfully, almost completely depleted the sick relief fund of The Butte Miners' Union, a corporation, which fund is for the use and benefit of sick and disabled members of The Butte Miners' Union in good standing; and that said defendants still persist in doing the above-mentioned acts and in preventing these plaintiffs, and particularly the plaintiff Ed. O'Byrne, and the members of The Butte Miners' Union, a corporation, who signed the charges and petition against said officers, from having its affairs and conduct of The Butte Miners' Union, a corporation, run and conducted in a just and lawful manner in accordance with the by-laws and constitution, for the government thereof.

V. That thereafter, on the 8th day of December, 1914, Guy E. Miller, one of the plaintiffs above named, as the true and lawful attorney in fact of Charles H. Moyer, President of the Western Federation of Miners, as aforesaid, holding a power of attorney from said Charles H. Moyer, President of the Western Federation of Miners, as aforesaid, a copy of which power of attorney is hereunto annexed, marked exhibit "D," and made a part of this complaint, at a regular meeting of the members of The Butte Miners' Union a corporation, presented the said charges and demanded that the aforesaid officers of said union to wit: Martin Seahill, President; Patrick Lee, Secretary-Treasurer; Patrick O'Neill, Recording [80] Secretary; Mike A. Sullivan, James Ryan, James Walsh and Patrick Quigley, Trustees; conform to said by-laws and constitution of the Western Federation of Miners, and The Butte Miners' Union and place in the hands of said Charles H. Moyer, President, as aforesaid, pending the determination of the above-mentioned charges and petition and the election of new officers, if said charges shall be found to be true, the affairs and business of said Butte Miners' Union, a corporation, as aforesaid, and the books and property thereof, for the purpose of safe-keeping and preservation, in the interest of said members of the corporation. That notwithstanding the presentation of said charges and petition as aforesaid, and the provisions of the constitution and by-laws, as aforesaid, of the said Western Federation of Miners, and of said Butte Miners' Union, a corporation, the aforesaid

defendants have failed, refused, and neglected, and have prevented, and are now preventing and threaten to continue to prevent the said Charles H. Moyer, President of said Western Federation of Miners, as aforesaid, from taking charge of, control of, the affairs and business of The Butte Miners' Union, a corporation as aforesaid, pending the determination of the said charges and the election of new officers by the members of said Butte Miners' Union, if the said charges shall be found true; and that the said Martin Scahill, President, Patrick Lee, Secretary-Treasurer, Patrick O'Neill, Recording Secretary, Mike A. Sullivan, James Ryan, James Walsh and Patrick Quigley, Trustees, continue to use the property of The Butte Miners' Union a corporation, as aforesaid, to draw its funds and moneys from the banks in which the same has been deposited, and to handle and take charge of the property and money, and prevent and threaten to continue to prevent the said Charles H. Moyer, President of the Western Federation of Miners, and his duly appointed, qualified and acting attorney in fact, from taking possession thereof, in accordance with the hereinbefore set forth charter, constitution and by-laws [81] of said Western Federation of Miners and Butte Miners' Union, a corporation, all to the irreparable loss and injury of the Western Federation of Miners, a voluntary association as aforesaid, and the membership of The Butte Miners' Union, a corporation of which Ed. O'Byrne, one of the plaintiffs above named is, and at all times herein mentioned has been, a member in good standing.



VI. That the defendants are without any money or means with which to respond in damages herein and to make good any loss and injury that has occurred, and will occur, through their actions hereinbefore set forth.

VII. That Ed. O'Byrne, one of the plaintiffs herein, is a member of The Butte Miners' Union, a corporation, and one of the persons who signed the charges against the defendants above named, the officers of The Butte Miners' Union, a corporation, and that he is personally interested in the affairs and conduct of The Butte Miners' Union, a corporation, having paid his dues and assessments thereto, and that he is a member of the Western Federation of Miners, a voluntary association and organization, as aforesaid, and interested in its affairs.

VIII. That Guy E. Miller, one of the plaintiffs herein, is a member of the Western Federation of Miners, and interested in its affairs.

IX. That there is no plain, speedy, or adequate remedy at law whereby the rights of these plaintiffs and of the membership of The Butte Miners' Union, a corporation, and of the Western Federation of Miners, a voluntary organization and association, as aforesaid, can be protected.

WHEREFORE, Plaintiffs pray judgment of this Honorable Court that this court make its order temporarily restraining the defendants herein, their agents, servants, employees and attorneys, or any one acting for or in their behalf, or under their direction, from in any way interfering with these plaintiffs in the possession [82] and control of the property of The Butte Miners' Union, a corporation, or the pros-



ecution of the business and affairs of The Butte Miners' Union, a corporation; and that this court fix a day and time certain wherein the defendants herein, and each and all of them, shall be commanded to show cause, if any they have, before this Honorable Court, why they and their agents, servants, and employees and attorneys and every one acting for and in their behalf, or under their direction and control, should not be permanently restrained and enjoined from in any way interfering with these plaintiffs and the members of the plaintiff organization in the possession and control of the property and affairs of The Butte Miners' Union, a corporation, pending the determination of the charges filed against the officers of said corporation and the holding and conducting of an election by the members of said corporation for new officers if the charges in this complaint set forth are found and proven to be true, and from putting the business of The Butte Miners' Union, a corporation, on a business basis.

CANNING & GEAGAN and  
E. P. KELLY,

Attorneys for Plaintiffs.

State of Montana,  
County of Silver Bow,—ss.

Guy E. Miller and Ed. O'Byrne, being first duly sworn, say: That they are two of the plaintiffs above named; that they have read the complaint, know the contents thereof, and that the facts, matters and things therein stated are true of their own knowledge.

GUY E. MILLER,  
ED. O'BYRNE,

Subscribed and sworn to before me this 8th day of Feb. A. D. 1915.

[Notarial Seal] P. E. GEAGAN,  
Notary Public for the State of Montana; residing at  
Butte, [83] Montana.

My commission expires Jan. 13, 1918.

### EXHIBIT "A."

To the President of the Western Federation of Miners, Denham Building, Denver, Colorado.

The Butte Miners' Union, a corporation, organized and existing under and by authority of the laws of the state of Montana, at a regular meeting held at the headquarters of the said corporation, 217 North Main St., Butte, Montana, on the 22d day of September, 1914, by a majority vote of its membership present at said meeting passed a resolution directing and instructing its president, secretary and board of directors or trustees, to apply to the Western Federation of Miners for a reissuance of a charter to the said corporation to take the place of its first charter recently lost or destroyed, and said resolution empowered and authorized its aforesaid officers to take all necessary steps and do all necessary things in order to procure said charter.

Now, therefore we, Frank O'Connor, President, Pat. O'Neill, Secretary, and Mike A. Sullivan, James Walsh, James Ryan, Frank Martin, Pat Quigley, constituting the board of Directors or Trustees of the said corporation, pursuant to the said resolution and by authority thereof, hereby make application to you for the re-issuance of a charter for a local union to be issued to the said corporation, which shall

be known as The Butte Miners' Union No. 1, Western Federation of Miners, which shall take the place of its first charter recently lost or destroyed.

It is hereby agreed in the acceptance of the said charter that the aforesaid corporation shall conform to all of its provisions and that the same are fully understood, and to the constitution, by-laws, rules and regulations of the Western Federation of Miners.

IN TESTIMONY WHEREOF, the said corporation has caused this application to be signed by its President, Secretary and Board of [84] Directors or Trustees, and its corporate seal to be attached thereto this 22d day of September, 1914.

THE BUTTE MINERS' UNION, a Corporation,

FRANK O'CONNOR,

President.

PAT O'NEILL,

Secretary.

M. A. SULLIVAN,

JAMES WALSH,

JAS. J. RYAN,

Board of Directors or Trustees.

EXHIBIT "B."

WESTERN FEDERATION OF MINERS  
CHARTER.

KNOW ALL MEN BY THESE PRESENTS,  
That acting under the authority vested in us by the laws of the above-named organization, we, the undersigned, do hereby grant this Charter to Butte Miners' Union, a corporation, to be hereafter known and

designated as the BUTTE MINERS' UNION NO. 1, WESTERN FEDERATION OF MINERS.

TO BE HELD BY THEM AND THEIR SUCCESSORS, And the aforesaid Union being properly installed, is hereby authorized and empowered to transact business and initiate into its membership, any person or persons lawfully proposed and elected in accordance with the constitution, rules and regulations of the Western Federation of Miners. It is hereby agreed in the acceptance of this Charter that the aforesaid union shall conform to the constitution, rules and regulations, and in default thereof, this charter may be revoked and the union suspended from all rights, and benefits, according to the laws of the Western Federation of Miners, and further, it is agreed that should the aforesaid union withdraw or be dissolved, suspended, or forfeit this charter, then all property, moneys, books and papers, shall become the property of the Western Federation of Miners. [85]

In consideration of the due and faithful performance of the foregoing stipulations, the Western Federation of Miners do bind themselves to sustain said union in the exercise of all rights, privileges and benefits, as a local union under its protection.

IN WITNESS WHEREOF, we have subscribed our names and affixed our seal of the Western Federation of Miners this Third day of October, 1914.

The Butte Miners' Union, organized June 13, 1878.



Original W. F. M. Charter dated May 15, 1893.

CHAS. H. MOYER,

President.

ERNEST MILLS,

Secretary-Treasurer.

EXHIBIT "C."

Butte, Mont., Nov. 23d, 1914.

To Chas. H. Moyer, President of the Western Federation of Miners, Denver, Colo.

We, the undersigned members of Butte Miners' Union, No. 1, W. F. of M. hereby petition you under the constitution to take full and complete charge of the affairs of this union and submit as our reasons for requesting such action, that the officials of said union have been and are acting in violation of the constitution of Butte Miners Union and of the Western Federation of Miners and further that there has been utter inefficiency and disregard of the best interests of the organization and the principles of unionism.

We submit the following: (1) Violation of the constitution by packing the meeting with men in arrears, some of whose names were not on the books of the union, giving them a voice and vote in matters of great importance. (2) Refusal of Secretary-Treasurer, aided and abetted by the president to submit books and accounts for examination. (3) Failure of walking delegates to render any report of the union or put forth reasonable efforts to increase the membership of this union. (4) Stamps on members cards without entry [86] on books of receipt. (6) Willful waste in the disbursing of funds, es-

pecially the sick relief, the constitutional notice to secretary not being complied with. (7) That indifference to the welfare of the organization is clearly manifested by the failure of various officials and trustees to keep in good standing.

Tim. J. Lynch,	John Toomey,
A. M. Maletto,	Dennis Murphy,
John Pearson,	W. H. Schauf,
Wm. Louma,	J. C. Lowney,
Mike Harrington,	F. M. Shields,
Varles Baxter,	Oskar Karri,
Ed O'Byrne,	Dan O'Leary,
Jalmer Koskinen,	Jacob Oliver,
E. G. Huntley,	Patrick King.

#### EXHIBIT "D."

#### POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS, That I, Charles H. Moyer, President of the Western Federation of Miners, a voluntary organization with its headquarters in the City and County of Denver, State of Colorado acting under the authority and power vested in me by the constitution of the Western Federation of Miners have made, constituted and appointed, and by these presents do make, constitute and appoint Guy E. Miller, of the City of Butte, State of Montana, my true and lawful attorney, for me and in my name, place and stead, to take complete charge of the affairs including all books and papers, of the Butte Miners' Union, a corporation existing under and by authority of the laws of the State of Montana, whose headquarters are at 217 North Main Street, Butte, Montana, and to receive and file any

and all charges that may be made against the local officers of said Union and to transmit the same or a copy thereof, to me, and to collect and receive any and all moneys which shall be due, owing and payable and belonging to the said Butte Miners' Union; and in my name represent before any judge or minister of the law whatsoever, and in any court or courts of [87] judicature, and on my behalf prosecute for any debt, fraud and any manner of claims that the said Butte Miners' Union may have against any person or persons and to answer, and defend all actions or causes whatsoever relating to the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming, and holding valid all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

Witness my hand and seal at Denver, Colo., this 7th day of December, A. D. 1914.

CHAS. H. MOYER,

President Western Federation of Miners.

State of Colorado,

City and County of Denver,—ss.

I, Fannie N. Patterson, a Notary Public in and for the City, County and State aforesaid, do hereby certify that Charles H. Moyer who is personally known to me to be the person whose name is subscribed to the within power of attorney, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing

as his free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 7th day of December, A. D. 1914.

My commission expires May 6th, 1915.

[Notarial Seal] FANNIE M. PATTERSON,

Notary Public. [88]

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**Exhibit "F" to Answer—Answer to Amended Complaint—Western Federation of Miners et al. vs. Scahill et al.**

*In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

**WESTERN FEDERATION OF MINERS**, a Voluntary Organization, Association of Persons With its Headquarters in the City and County of Denver, State of Colorado, and **Charles H. MOYER**, President of the Western Federation of Miners, a Voluntary Organization and Association of Persons, With its Headquarters in the City and County of Denver, and State of Colorado; **GUY E. MILLER** and **ED O'BYRNE**,

Plaintiffs,

vs.

**MARTIN SCAHILL**, **PATRICK LEE**, **PATRICK O'NEILL**, **MIKE A. SULLIVAN**, **JAMES RYAN**, **JAMES WALSH** and **PATRICK QUIGLEY**,

Defendants.



**Answer to Amended Complaint.**

Come now the above-named defendants, Martin Seahill, Patrick Lee, Patrick O'Neill, Mike A. Sullivan, James Ryan, James Walsh and Patrick Quigley, and answering the Complaint of plaintiff on file herein, admit, deny and allege as follows, to wit:

1. Deny all the allegations contained in paragraph 1 of plaintiffs' Amended Complaint.

2. Admits all the allegations contained in paragraph II of plaintiffs' Amended Complaint.

3. Answering paragraph III of plaintiff's Amended Complaint these defendants deny all the allegations contained in said paragraph III.

4. Deny any knowledge or information thereof sufficient to form a belief as to the allegations set forth in paragraph IV of plaintiffs' Amended Complaint.

5. Deny all of the allegations contained in paragraph IV-A of plaintiffs' Amended Complaint.

6. Deny each and all of the allegations contained in paragraph V of plaintiffs' Amended Complaint, save and except that these answering defendants have, for a long time past, and are still, [89] attempting to prevent the said Charles H. Moyer, mentioned in said paragraph, or any other person acting in collusion with him or representing him, from getting possession or control of the moneys or property of The Butte Miners' Union, a corporation.

7. Deny all the allegations contained in paragraph VI of plaintiffs' Amended Complaint.

8. Admits that the plaintiff, Ed. O'Bryne is a

member of The Butte Miners' Union, a Corporation, as set forth in paragraph VII of plaintiffs' Amended Complaint, but save as is herein admitted, these answering defendants deny any knowledge or information thereof sufficient to form a belief as to all other allegations set forth in said paragraph VII of plaintiffs' Amended Complaint.

9. Deny all the allegations contained in paragraph VIII of plaintiffs' Amended Complaint.

10. Deny all the allegations contained in paragraph IX of plaintiffs' Amended Complaint.

11. Save as is herein specifically admitted or denied these answering defendants deny each and every allegation contained in plaintiffs' Amended Complaint.

WHEREFORE having fully answered, these answering defendants pray that the said plaintiffs take nothing by this action and that they be given their costs herein expended.

Further answering and as an affirmative defense to the Amended Complaint of plaintiffs, these answering defendants allege:

1. That they are now and have been during all of the times herein mentioned in plaintiffs' Amended Complaint members in good standing of the Butte Miners' Union, a Corporation.

2. That the said The Butte Miners' Union, now is and has been during all of the times herein mentioned in plaintiffs' Amended Complaint, and ever since the 4th day of May, 1881, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its place of busi-

ness in the City of Butte, [90] County of Silver Bow, State of Montana.

3. That the defendant Martin Scahill is now and has been during all the times herein mentioned in plaintiffs' Amended Complaint, the duly elected, qualified and acting president of The Butte Miners' Union, a Corporation; That the defendant, Patrick Lee, during all of the times herein mentioned in plaintiffs' Amended Complaint has been, and now is the duly elected, qualified and acting secretary-treasurer of The Butte Miners' Union, a corporation; That the defendant Patrick O'Neill is now and has been during all of the times herein mentioned, the duly elected, qualified and acting recording secretary of The Butte Miners' Union, a corporation; That the defendant Mike A. Sullivan, is now and has been, during all of the times herein mentioned in the Amended Complaint of plaintiffs, the duly elected, qualified and acting chairman of the Board of Trustees of The Butte Miners' Union, a corporation; That the defendant Patrick Guigley, is now and has been during all of the times herein mentioned, a duly elected, qualified and acting member of the Board of Trustees of The Butte Miners' Union, a corporation; That the defendants James Ryan and James Walsh were, at the commencement of this action, duly elected, qualified and acting members of the Board of Trustees of The Butte Miners' Union, a Corporation.

4. That the above-named plaintiff, Western Federation of Miners, an alleged voluntary organization association of persons, with its headquarters in the

City and County of Denver, State of Colorado, was at one time a *bona fide* labor organization composed of various local unions or organizations in different states and territories in the United States of America, also in Canada.

5. That on or about the —— day of May, 1893, The Butte Miners' Union, a corporation, applied for a charter in said Western Federation of Miners and that thereafter, on or about the 15th day of May, 1893, a charter was duly issued to The Butte Miners' Union, a corporation, as aforesaid. [91]

6. That thereafter, on the 13th day of June, 1914, the charter issued by the Western Federation of Miners to The Butte Miners' Union, a corporation, was destroyed and that thereafter, on or about the 22d day of September, 1914, the said The Butte Miners' Union, a corporation, applied to the plaintiff, Western Federation of Miners for a duplicate of said charter, which was duly issued to The Butte Miners' Union, a corporation, on or about the 3d day of October, 1914.

7. That between the 15th day of May, 1893, the date of issuance of the first charter and the 1st day of December, 1914, The Butte Miners' Union, a corporation, as aforesaid, has paid to the plaintiff, Western Federation of Miners, as per capita tax, assessments levied and donations appealed for, a sum in excess of One Million (\$1,000,000) Dollars.

8. That the said The Butte Miners' Union, a corporation, between the 1st day of July, 1913, and the first day of July, 1914, paid assessments to the plaintiff, Western Federation of Miners, One Hun-



dred, Thirty-eight Thousand Eight Hundred and Twenty-five and 60/100 (\$138,825.60) Dollars, donations, Twenty-one Hundred (\$2100) Dollars, per capita, Seventeen Thousand Five Hundred (\$17,500) Dollars, Supplies Five Hundred (\$500) Dollars, amounting to the total sum of One Hundred Fifty-eight Thousand Nine Hundred and Twenty-five and 60/100 (\$158,925.60) Dollars.

9. That between January 5, 1914, and June 15th, of said year, in dues, assessments and donations, the said plaintiff Western Federation of Miners, received the following sums of Money from The Butte Miners' Union:

January	5	.....	\$ 2000.00
"	19	.....	10000.00
"	22	.....	10000.00
February	4	.....	5000.00
"	5	.....	1250.00
"	16	.....	10000.00
"	23	.....	1250.00
"	23	.....	100.00
March	6	.....	8000.00
"	23	.....	10000.00
"	23	.....	1250.00

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April	16	.....	6000.00
"	16	.....	450.00
"	22	.....	8000.00
May	20	.....	1000.00
June	4	.....	1250.00
"	15	.....	3000.00

making a total of Seventy-eight Thousand, Five Hundred and Fifty (\$78,550.00) Dollars.

10. That upon January 1, 1914, the plaintiff, Western Federation of Miners claimed that The Butte Miners' Union, a corporation, owed it a balance of Forty-four Thousand Two Hundred and Sixty-eight and 15/100 (\$44,268.15) Dollars, and from said date January 1, 1914, to June 2nd of said Year, the following additional amounts:

January	1	.....	\$44268.15
"	16	.....	1250.00
"	21	.....	55.00
February	1	.....	15428.00
"	5	.....	1250.00
"	10	.....	166.50
March	1	.....	20317.50
"	2	.....	1250.00
"	2	.....	7.50
"	18	.....	1250.00
April	1	.....	20639.50
"	10	.....	1250.00
May	1	.....	19656.00
"	7	.....	1250.00
June	1	.....	7576.00
"	2	.....	1250.00

making a total amount owing from January 1, 1914, to June 2d, 1914, One Hundred Thirty-six Thousand, Eight Hundred and Sixty-four and 65/100 (\$136,864.65) Dollars.

11. After receiving the said sum of Seventy-eight Thousand Five Hundred and Fifty (\$78,550) Dollars, in a period of six months, the said plaintiff, Western Federation of Miners, claim that at said time, to wit, June 13, 1914, there was due and owing

from The Butte Miners' Union, a corporation, to the plaintiff, Western Federation of Miners, a balance of Sixty Thousand Four Hundred and Fifteen and 65/100 (\$60,415.65) Dollars.

12. These defendants further allege that during all of the time in which the said plaintiff, Western Federation of Miners, demanded and received the said sums of money above set forth, from [93] The Butte Miners' Union, a corporation, the said corporation, was compelled to pay the said sums of money to the said plaintiff, through its officers and were not permitted to, at any time, send the money themselves, to the places wherein the said officers of the said plaintiff claimed it was wanted for and was to be sent.

13. These answering defendants further allege, that through all of the years in which the said The Butte Miners' Union, a corporation, has worked under a charter from the said plaintiff, Western Federation of Miners, that it has not received *on* cent of benefit in any shape, manner or form from the said plaintiff, Western Federation of Miners.

14. These answering defendants further allege, that on or about the 15th day of May, 1893, the said The Butte Miners' Union, a corporation, had thousands of members and thousands of dollars in its treasury. That all of its members were working in harmony and that they enjoyed the respect, confidence and good will of all of the employers of mines in the County of Silver Bow, State of Montana and its union cards were recognized and respected by all of them.

15. That because of the tyranny and many exactions of the said plaintiff, Western Federation of Miners, and the manner in which the money of The Butte Miners' Union, a corporation, had been taken by the said plaintiff, the Western Federation of Miners, without any return to The Butte Miners' Union, a corporation dissatisfaction, was created among its members and the citizens of Silver Bow County, to such an extent that they revolted on the 13th day of June, 1914, and later on the 23d day of said month, when the plaintiff, Charles H. Moyer, came to Butte to run the business of The Butte Miners' Union, a corporation, assisted by many others they again revolted, destroyed a large amount of property of The Butte Miners' Union, a corporation, and attempted to capture and hang the said plaintiff, Charles H. Moyer.

16. That the said plaintiff, Charles H. Moyer, pretended president of the pretended Western Federation of Miners, the said [94] plaintiff Guy E. Miller, the pretended attorney in fact of the said Charles H. Moyer, the said Ed. O'Byrne, and one John C. Lowney, and one Charles Mahoney, have conspired and confederated themselves together with other members of the alleged and pretended executive board of the pretended Western Federation of Miners, for the purpose of plundering The Butte Miners' Union, a corporation, and getting possession of its funds and property, and appropriating the same to their, the said Moyer, Miller, Mahoney, Lowney and O'Byrne and others own use.

17. That in furtherance of said conspiracy, the



said Moyer did shortly after the 13th day of June, 1914, attempt to get possession of the money, the property of The Butte Miners' Union, a corporation, on deposit in the banking-house of the Daly Bank and Trust Company in Butte City, Montana, and in furtherance of said scheme of plunder, did falsely and fraudulently represent to the said banking-house that it was his intention to remove the said moneys, the property of The Butte Miners' Union, a corporation, to Denver, Colorado, for safe keeping.

18. That the plaintiff, Western Federation of Miners, is no longer a *bona fide* labor organization. That it is but a pretense and a sham, whose only purpose is to attempt to collect moneys for the purpose of paying salaries, hotel bills and etc., so as to keep the above-named plaintiffs, Moyer, Miller, and the above mentioned Lowney, Mahoney and O'Byrne and others in idleness at the expense of the miners and others in the country, who yield to their persuasions or succumb to their bluffs.

19. That it has neither membership or standing in any of the former fields of its activity, nor its members recognized, except in the smelter of Anaconda and the stationary engineers of Butte. The said smeltermen and engineers being recognized upon their own merits, and not because of their affiliation with the plaintiff, Western Federation of Miners. That since deprived [95] of the donations and per capita of The Butte Miners' Union, a corporation, it has not been able to pay its bills or meet its obligations in any manner, and has repeatedly appealed to The Butte Miners' Union,

a corporation, since the 13th day of June last, to advance it money, to pay the bills *contract* by it for gunmen to guard the said plaintiff, Charles H. Moyer and others of its officers, and to pay the expense of the delegate elected by it to attend the convention held at Philadelphia. That it was unable to pay the bills for guns bought and borrowed by Moyer, upon and a few days prior to the 23d day of June, 1914, last, and lost by him and them upon the said date and the said bill was, upon the request of the plaintiff, Moyer, paid by The Butte Miners' Union, a corporation.

20. That upon the last visit of the said Charles H. Moyer, to Butte, he found it necessary to place gunmen upon the landings and in the halls leading to his room in the hotel in which he stopped and said bills, so contracted by him, were paid by the said The Butte Miners' Union, a corporation. And if the plaintiff Moyer now came to Butte to take charge of the property of The Butte Miners' Union, a corporation, it would require a large amount of money to supply him with guards.

21. That the said request for donations for the payment of the numerous bills of the said plaintiff, Western Federation of Miners, and its officers, after the 13th day of June, 1914, became so numerous, expensive and burdensome, that the loyal members of The Butte Miners' Union, a corporation, who had remained loyal to it, during all of its troubles, refused to further vote money for the purpose of keeping Moyer and his associates living in idleness and luxury, in useless and expensive offices in the

City of Denver, Colorado, hundreds of miles from a mine or miners' union and boarding him at the best hotels in the country and riding in Pullman coaches, when the members of The Butte Miners' Union, a corporation were idle and their families suffering want. [96]

22. That all of these answering defendants are officers of The Butte Miners' Union, a corporation and the members in good standing thereof, refused to longer contribute the money of The Butte Miners' Union, a corporation, for the above mentioned purposes, and thereby incurred the ill-will of the said plaintiff, Western Federation of Miners, Charles H. Moyer, Guy E. Miller, Ed. O'Byrne, Charles Mahoney, J. C. Lowney and others who conspired and confederated together for the purpose of removing these answering defendants from office in The Butte Miners' Union, a corporation, and then wrecking the said union and appropriating its moneys and property to their own use and for said purpose, did attempt, through their paid tools, to bring proceedings to remove these defendants from office and discouraging others from assisting them in rebuilding The Butte Miners' Union, a corporation, and are now proclaiming through the press that they own the money of The Butte Miners' Union, a corporation, and will not permit the said union to rebuild its hall with its own money and credit.

23. That by reason of their acts and activities along this line, and by reason of the fear engendered in the minds of the legitimate miners of Silver Bow County, that their money would again be contributed



to support the above-named plaintiffs and their lackeys, they have refused to pay dues to The Butte Miners' Union, a corporation, and the labor of these answering defendants have been multiplied many times.

24. That the said plaintiffs above-named and those associated with them, have in every possible manner, attempted to prevent The Butte Miners' Union, a corporation, from carrying on its business of protecting its members, burying their dead and caring for their sick; have warned the banking-house, wherein their money is deposited, that if its checks are honored, that they will bring suit against the said bank for the recovery of money so paid out. Have circulated many slanderous reports about these answering [97] defendants, among others, that they were not officers of the Union; that there was no union in existence, and that all moneys and properties of the said union, was the property of the above-named plaintiffs.

25. These answering defendants further say: that if the plaintiffs above-named are permitted to continue as they have been, that it will be impossible to build up The Butte Miners' Union, a corporation, or to increase its membership finances or standing, to what it was before.

26. That each and all of the above-named plaintiffs are insolvent. Are without means, property or resources whatever, except what is secretly and privately concealed from public knowledge, and their unlawful acts can only result in great and irreparable injury to these answering defendants and to The



Butte Miners' Union, a corporation, whose officers they are, and that unless restrained and enjoined from further interfering in any manner with The Butte Miners' Union, a corporation, or with its property, or with these defendants in the conduct of the business of The Butte Miners' Union, a corporation, all of the interests and property they represent and are pledged to protect, will be destroyed.

27. That there is no plain, speedy or adequate remedy at law.

WHEREFORE, these answering defendants pray,

1. That the plaintiffs herein take nothing by this action.
2. That the defendants be given judgment for their costs.
3. That during the pendency of this action, the plaintiffs herein, their servants, agents, attorneys and employees and all persons acting for them or by their authority or under their control be temporarily restrained and enjoined from, in any manner, interfering with the business or property of The Butte Miners' Union, a corporation, or these defendants or any of them, in the fulfillment of their duties as officers of The Butte Miners' Union, a corporation. [98]
4. That upon the final hearing of this case, that the said plaintiffs and each of them, their servants, agents, attorneys and employees and all persons acting in their behalf or under their control, be permanently enjoined from, in any manner, interfering with The Butte Miners' Union, a corporation, or with its business affairs interfering in any manner whatsoever, with these defendants or the conduct of the business

of The Butte Miners' Union, a corporation.

A. C. McDANIEL and  
PETER BREEN,  
Attorneys for Defendants.

State of Montana,  
County of Silver Bow,—ss.

Patrick Lee being first duly sworn, says: That he is one of the defendants named in the foregoing answer; that he had read the said answer, knows the contents thereof, and that the same is true, except as to matters and things stated on information and belief, and as to these he believes it to be true.

PATRICK LEE.

Subscribed and sworn to before me this 19th day of February, 1915.

[Seal] PETER BREEN,  
Notary Public for the State of Montana, Residing  
at Butte, Montana.

My commission expires June 2d, 1916.

Service of the foregoing answer acknowledged and copy received February 20th, 1915.

CANNING & GEAGAN and  
E. P. KELLY,  
Attorneys for Plaintiffs. [99]

**Exhibit "G"—Reply to Answer, Western Federation of Miners et al. v. Scahill et al.**

*In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

**WESTERN FEDERATION OF MINERS**, a Voluntary Organizations, Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado, and **CHARLES H. MOYER**, President of the **WESTERN FEDERATION OF MINERS**, a Voluntary Organization and Association of Persons, With Its Headquarters in the City and County of Denver, and State of Colorado; **GUY E. MILLER** and **ED O'BYRNE**,  
Plaintiffs,

vs.

**MARTIN SCAHILL**, **PATRICK LEE**, **PATRICK O'NEILL**, **MIKE A. SULLIVAN**, **JAMES RYAN**, **JAMES WALSH** and **PATRICK QUIGLEY**,

Defendants.

Comes now the plaintiffs above-named and for reply to the answer of the defendants herein, admits, deny and allege, as follows, to wit:

Deny, generally and specifically each and every of the allegations in *in* said answer contained.

WHEREFORE, having fully replied the plain-

tiffs pray judgment in accordance with the prayer of their complaint herein.

CANNING & GEAGAN and  
E. P. KELLY,

Attorneys for Plaintiffs.

State of Montana,  
County of Silver Bow,—ss.

Guy E. Miller, being first duly sworn upon oath deposes and says: That he is one of the plaintiffs named in the above-entitled action, and makes this verification in behalf of himself and the other plaintiffs, and says that he has read the foregoing reply, knows the contents thereof, and that the same is true of his own knowledge, except as to matters and things therein stated upon information and belief, and as to these matters and things he believes them to be true.

GUY E. MILLER. [100]

Subscribed and sworn to before me this 16th day of March, A. D. 1915.

[Notarial Seal]

P. E. GEAGAN,

Notary Public in and for the State of Montana, Residing at Butte, Montana.

My commission expires Jan. 13, 1918.

[Endorsed]: Filed May 13, 1915. [101]

**Exhibit "H" to Answer—Power of Attorney,  
Moyer, etc. to Miller.**

KNOW ALL MEN BY THESE PRESENTS,  
That I, Charles H. Moyer, President of the Western Federation of Miners, a voluntary organization of the City and County of Denver, State of Colorado, have made, constituted and appointed, and by these



presents do make, constitute and appoint Guy E. Miller, of the City of Butte, State of Montana, my true and lawful attorney, for me and in my name, place and stead, to take complete charge of the affairs, including all books and papers of the Butte Miners' Union, a Corporation, existing under and by authority of the laws of the State of Montana, whose headquarters are at 217 North Main Street, Butte, Montana, and to receive and file any and all charges that may be made against the local officers of said union, and to transmit the same or a copy thereof to me, and to collect and receive any and all moneys which shall be due, owing and payable, and belonging to the said Butte Miners' Union; and in my name represent before any Judge or Minister of the Law, whatsoever, and in any court or courts of Judicature, and on my behalf prosecute for any debt, fraud and any manner of claims that the said Butte Miners' Union may have against any persons or persons, and to answer, defend all actions or causes whatsoever relating to the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming, and holding valid all that my said attorney shall *lawfull* do or cause to be done by virtue of these presents.

Witness my hand and seal at Denver, Colorado, this 30th day of November, A. D. 1914.

CHAS. H. MOYER, (Seal)

President W. F. M. [102]

State of Colorado,  
City and County of Denver,—ss.

I, \_\_\_\_\_, a Notary Public in and for the City, County and State aforesaid, do hereby certify that \_\_\_\_\_, who is personally known to me to be the person whose name is subscribed to the within Power of Attorney appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this \_\_\_\_ day of November, A. D. 1915.

My commission expires \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

[103]

**Exhibit "I" to Answer—Order to Show Cause and Restraining Order, Western Federation of Miners et al. vs. Scahill et al.**

*In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Voluntary Organization, Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado, and CHARLES H. MOYER, President of the WESTERN FEDERATION OF MINERS, a Voluntary Organization and Association of Persons, With Its Headquarters in the City and

County of Denver, and State of Colorado;  
GUY E. MILLER and ED. O'BYRNE,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PAT-  
RICK O'NEILL, MIKE A. SULLIVAN,  
JAMES RYAN, JAMES WALSH and  
PATRICK QUIGLEY,  
Defendants.

ORDER TO SHOW CAUSE AND RESTRAIN-  
ING ORDER.

On the Amended Complaint of the plaintiffs herein duly verified, the material allegations made positively, a copy of which is hereto attached.

IT IS ORDERED: That the defendants above named, and each of them, show cause before the above-entitled court in department 2 thereof, at the courthouse, in the City of Butte, County of Silver Bow, State of Montana, on the 20th day of February, 1915, at 9:30 o'clock A. M. of said day, why an injunction should not be granted restraining them, and each of them, and all of their agents, servants, employees, attorneys and anyone acting for or in their behalf or under their direction, from in any way interfering with the plaintiffs herein, and the plaintiff Charles H. Moyer, as President of the Western Federation of Miners, in the possession and control of the property of The Butte Miners Union, a corporation, pending the determination of the charges filed against the officers of said corporation, a copy of which said charges is set forth in the complaint herein, and the holding and conducting of an election

by the members of said [104] corporation for new officers, if the charges set forth in the complaint herein and filed by the members of said corporation against the defendants herein, as officers of said corporation are found and proven to be true, and from interfering with the putting of the business of The Butte Miners' Union, a corporation on a business basis.

Dated this 8th day of Feb. A. D. 1915.

JOHN B. McCLERNAN,  
Judge.

Attest: [Court Seal] JOHN J. FOLEY,  
Clerk of the District Court of the Second Judicial  
District, of the State of Montana.

By J. J. Vines,  
Deputy. [105]

**Exhibit "J" to Answer—Conclusions of Law—  
Western Federation of Miners et al. vs. Scahill  
et al.**

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization, Association of Persons,  
With Its Headquarters in the City and County  
of Denver, State of Colorado, et al.,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PATRICK  
O'NEILL, MIKE A. SULLIVAN, JAMES  
RYAN, JAMES WALSH and PATRICK  
QUIGLEY,

Defendants.



Upon the facts adduced on the hearing of the order to show cause herein, the Court finds for the plaintiffs and makes the following:

### CONCLUSIONS OF LAW.

I. That the application to the Western Federation of Miners for a charter by Butte Miners' Union No. 1, a corporation, and the granting of the same by the Western Federation of Miners, and the acceptance thereof by the said union corporation, established contractual relations between the two bodies legally binding on both.

II. That the amendment to the constitution of the Western Federation of Miners set forth in the Amended Complaint, and known throughout the hearing as Amendment No. 2, was regularly adopted by the Western Federation of Miners and locals constituting the same, and thereupon became and was a part of the constitution of the Western Federation of Miners and binding upon the said union, corporation, by reason of its application for and acceptance of the Charter hereinbefore mentioned, and became and was part of the contract existing between the Western Federation of Miners and the union, corporation. That whether or not it was the part of wisdom to adopt the said amendment is not a matter for consideration by this court. [106]

III. That in accordance with the terms and provisions of said constitution, as amended, charges were regularly preferred against all of the above-named defendants, and the said defendants, so charged, with the exception of James Walsh and James Ryan, trustees of said union, corporation, de-

clined and refused, after demand, to comply with the terms, conditions, and refused, *after demand, to comply with the terms, conditions* and provisions of the Constitution of the Western Federation of Miners, as amended.

IV. That Guy E. Miller was the duly appointed and lawful attorney in fact of Charles H. Moyer, president of the Western Federation of Miners at the time of the presentation of said charges and the making of said demand, and presented said charges and made said demand pursuant to the authority in him vested by written power of attorney from said Moyer to him. That the power so delegated by said Moyer, as president of the Western Federation of Miners, was purely administrative and ministerial and could be and was legally delegated.

V. That a temporary injunction should issue herein.

#### IT IS THEREFORE ORDERED:

I. That a temporary restraining order issue herein, enjoining and restraining the defendants (excepting James Walsh and James Ryan), their agents, servants, employees and attorneys, or anyone acting *for on* in their behalf, or under their direction, from in any way interfering with the plaintiffs, Western Federation of Miners, or Guy E. Miller, the attorney in fact of Charles H. Moyer, president of the Western Federation of Miners, in the possession and control of the property of the Butte Miners' Union No. 1, a corporation, for the purpose mentioned in the said amendment to the Constitution of

the Western Federation of Miners.

II. Enjoining and restraining said plaintiffs, and each and all of *the* their agents, servants, employees and attorneys, or anyone acting for or in their behalf, from disposing of the whole or any part, of the funds of the Butte Miners' Union No. 1, a [107] corporation, now on deposit in any bank in Butte, from removing the same from said bank or banks, and from in any manner interfering with the same without further order of this court; and from disposing of or removing from the County of Silver Bow, Montana, any of the books, records, property or effects of said Butte Miners' Union, No. 1, a corporation.

Done in open court this 12th day of June, 1915.

JOHN B. McCLERNAN,

Judge. [108]

**Exhibit "K" to Answer—Temporary Restraining Order, Western Federation of Miners et al. vs. Scahill et al.**

*In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Voluntary Organization and Association of Persons, With Its Headquarters in the City and County of Denver, State of Colorado, et al.,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PATRICK O'NEILL, MIKE A. SULLIVAN, JAMES A. RYAN, JAMES WALSH and PATRICK QUIGLEY,

Defendants.



## TEMPORARY RESTRAINING ORDER.

This matter coming on regularly for hearing on the —— day of May, 1915, on the order to show cause heretofore issued herein, plaintiffs being represented by their attorneys, Canning, Geagan and Kelly, and the defendants being present in person and represented by their counsel, Peter Breen and A. C. McDaniel, Esq., testimony was thereupon introduced on behalf of plaintiffs, and being concluded, testimony was thereupon introduced on behalf of defendants, and being concluded, and both sides having announced that the testimony on the said hearing was closed, counsel for the respective parties thereupon argued the said cause orally, and thereafter, the Court took the said order to show cause under advisement, and the Court being fully advised in the premises:

NOW, THEREFORE, it is hereby ordered, and this does order that the defendants, Martin Scahill, Patrick Lee, Patrick O'Neill, Mike A. Sullivan and Patrick Quigley, be and each and all of them, their agents, servants or employees, or anyone acting for or on their behalf, or under their direction, are hereby enjoined and restrained from in any way or manner interfering with the plaintiffs, Western Federation of Miners, or Guy E. Miller, the attorney in fact of Charles H. Moyer, the [109] President of the Western Federation of Miners in the possession and control of the property of the Butte Miners' Union No. 1, a corporation, for the purposes mentioned in the amendment to the constitution of the Western Federation of Miners as alleged in the



Amended Complaint of plaintiffs and known throughout the hearing of the order to show cause as "Amendment No. 2."

AND IT IS FURTHER ORDERED, and this does order that the said plaintiffs, and each and all of them, their agents, servants, employees and attorneys, or any one acting for or on their behalf are hereby enjoined and restrained from disposing of the whole or any part of the funds of the Butte Miners' Union No. 1, a corporation, now on deposit in any bank in Butte, or from removing the same from the said bank or banks, or from in any manner interfering with the same without the further order of this court, and are hereby enjoined and restrained from disposing of, or removing from the County of Silver Bow, Montana, any of the books, records, property or effects of the said Butte Miners' Union No. 1, a corporation.

Done in open court this 14th day of June, 1915.

JOHN B. McCLERNAN,

Judge. [110]

**Exhibit "L" to Answer—Affidavit of Martin Scahill, State ex rel. Butte Miners' Union vs. District Court, etc.**

*In the Supreme Court of the State of Montana.*

THE STATE OF MONTANA, on the Relation of  
THE BUTTE MINERS' UNION, a Corpo-  
ration, MARTIN SCAHILL, PATRICK  
LEE, PATRICK O'NEILL, MIKE A. SUL-  
LIVAN, and PATRICK QUIGLEY,

Relators and Plaintiffs,

vs.

THE DISTRICT COURT OF THE SECOND  
JUDICIAL DISTRICT OF THE STATE  
OF MONTANA, in and for the County of  
Silver Bow, and the Hon. John B. McClernan,  
One of the Judges Thereof, Western Federa-  
tion of Miners, a Voluntary Organization and  
Association of Persons With Its Headquar-  
ters in the City and County of Denver, State  
of Colorado; Charles H. Moyer, President of  
the Western Federation of Miners, a Volun-  
tary Organization and Association of Persons,  
With Its Headquarters in the City and  
County of Denver, State of Colorado; Guy E.  
Miller; and Ed. O'Byrne,

Respondents and Defendants.

AFFIDAVIT FOR WRIT.

State of Montana,

County of Silver Bow,—ss.

Martin Seahill, being first duly sworn, on oath says:

That the plaintiff, The Butte Miners' Union, is now and was at all of the times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Montana; that on or about the 4th day of May, 1881, *the* The Miners' Union, duly and regularly filed in the office of the county clerk and recorder of Silver Bow County, Montana, its articles of incorporation, a true copy of which articles are hereto attached, marked Exhibit "I," and made a part of this affidavit; that on or about the 8th day of February, 1901, the said The Miners' Union filed in said county clerk and recorder's office an extension of its corporate [111] existence, a true copy of which extension is hereto attached, marked Exhibit II, and made a part of this affidavit; that on or about the 13th day of August, 1914, the said corporation filed in said county clerk and recorder's office a certificate of change of name of said corporation, changing the name to "The Butte Miners' Union," a true copy of which certificate is hereto attached, marked Exhibit III, and made a part of this affidavit; and said matters in this paragraph mentioned were duly filed in the office of the Secretary of State of Montana.

2. That the membership of said corporation consists of persons engaged in the mining, milling and

reduction of ores and minerals and about the mining, milling and reduction of ores and minerals in Butte, Montana, and vicinity.

3. That the plaintiff, Martin Scahill, is the president of said corporation, he being duly and regularly elected vice-president and taking the office of vice-president on the 7th day of July, 1914, and afterwards on December 1, 1914, upon the resignation of the president of said corporation, duly and regularly taking the said office of president; that the plaintiff Patrick Lee is the duly elected, qualified and acting secretary-treasurer of said corporation for the term beginning July 7, 1914, and ending July 6, 1915; that the plaintiff Patrick O'Neill is the duly elected, qualified and acting recording secretary of said corporation for the term beginning July 7, 1914, and ending July 6, 1915; that the plaintiffs Mike A. Sullivan and Patrick Quigley are the duly elected, qualified and acting trustees of said corporation for the term beginning July 7, 1914, and ending July 6, 1915.

4. That on the 17th day of December, 1914, an action, numbered A-6590, was commenced, by the filing of a complaint, in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, by the Western Federation of Miners, a voluntary organization and association of persons, with [112] its headquarters in the City and County of Denver, State of Colorado, and Charles H. Moyer, President of the Western Federation of Miners, a voluntary organization and association of persons with its headquar-



ters in the City and County of Denver, and State of Colorado, and Guy E. Miller and Ed O'Byrne, as plaintiffs, against Martin Seahill, Patrick Lee, Patrick O'Neill, Mike A. Sullivan, James Ryan, James Walsh and Patrick Quigley, as defendants; that afterwards and on or about the 8th day of February, 1915, the said plaintiffs therein in said action, by leave of Court, served and filed their Amended Complaint in said action, a true copy of which Amended Complaint is hereto attached, marked Exhibit IV, and made a part of this affidavit; that thereafter on or about the 20th day of February, 1915, the said defendants in said action duly served and filed their Answer to said Amended Complaint, a true copy of which answer is hereto attached, marked Exhibit V, and made a part of this affidavit; that thereafter and on or about the 13th day of May, 1915, the said plaintiffs by leave of Court first had and obtained, filed their reply to said answer, a true copy of which reply is hereto attached, marked Exhibit VI, and made a part of this affidavit; that thereafter and on or about the — day of May, 1915, the said plaintiffs, by leave of Court, first had and obtained, amended said Amended Complaint by substituting for exhibit "D" thereof, a power of attorney from Charles H. Moyer, to Guy E. Miller, another and different power of attorney from Charles H. Moyer to Guy E. Miller, a true copy of which last mentioned power of attorney is hereto attached marked Exhibit VII, and made a part of this affidavit.

5. That on or about the 8th day of February, 1915, the said District Court of the Second Judicial

District made and entered an order that the said defendants in said action in said court appear before said Court and show cause why a temporary restraining order should not issue in said action restraining said defendants therein from doing certain acts, a true copy of which order to show cause is [113] hereto attached, marked exhibit VIII, and made a part of this affidavit; that thereafter and on or about the 20th day of February, 1915, the said order came regularly on for hearing and the hearing was not completed and said order was at divers times partially heard and was finally on or about the 2d day of June, 1915, finally submitted to the said court and judge, which after hearing the evidence submitted and the arguments of counsel afterwards on the 12th day of June, 1915, fully made and entered an order restraining the said defendants in said action, excepting James Ryan and James Walsh, from doing certain acts, a true copy of which order is hereto attached, marked exhibit IX, and made a part of this affidavit; that thereafter and on June 14th, 1915, the Court made and entered another order, a true copy of which order is hereto attached, marked exhibit X, and made a part of this affidavit.

6. That the amendment to the constitution of the Western Federation of Miners under which the plaintiffs in said action in said court claim the relief prayed for in said Amended Complaint is in words and figures following, to wit:

The president shall have power on petition of ten per cent of the members in good standing in their respective locals making charges in writing against

their local officers to take complete charge of the local's affairs, and if the charges are proven he shall call a special election within 30 days and place local's affairs on a business basis before relinquishing to local's officials.

7. That the said Court was and is wholly without, and in excess of its, jurisdiction to make or enter said order dated June 12, 1915, Exhibit IX hereof, or said order dated June 14th, 1915, Exhibit X hereof, or any part or portion thereof, and was and is proceeding under a mistake of law, in this, and for each of the following reasons:

a. The said amendment to the constitution of the Western Federation of Miners is and was void for each of the following reasons: [114]

(1) It is uncertain;  
(2) It is unreasonable;  
(3) It is indefinite;  
(4) It deprives a person of property without due process of law, contrary to the constitution of the State of Montana;

(5) It deprives a person of property without due process of law, contrary to the constitution of the United States.

(6) It deprives the The Butte Miners Union, a corporation organized and existing under the laws of the State of Montana, of the possession and control of its property, contrary to the laws of the State of Montana, and of the United States;

(7) It places the control of the said corporation in the hands of others than its duly elected officers,



contrary to the laws of the State of Montana and of the United States;

(8) It places the control of the property of said corporation in the hands of others than its duly elected officers contrary to the laws of the State of Montana, and of the United States;

(9) It places the property of said corporation in the custody and control of others than its duly elected officers, contrary to the laws of the State of Montana, and of the United States;

(10) The said corporation can be managed by no others than its duly elected officers provided for by the laws of the State of Montana;

(11) The said amendment seeks to confiscate without judicial process property owned and held absolutely by the said The Butte Miners' Union, a Corporation;

(12) A corporation organized under the laws of the State of Montana cannot subject itself or its members [115] to the jurisdiction of an authority existing outside of or beyond the control of the laws of the State of Montana;

(13) By-laws or constitutions of voluntary associations cannot have the force of law nor impair nor affect the rights of property against the will of its real owner;

(14) A corporation organized and existing under the laws of the State of Montana cannot be deprived of the possession or control of property belonging to it by the Western Federation of Miners or any of its agents, officers, servants or attorneys;

(15) The said amendment to said constitution



provides for no notice to the said The Butte Miners' Union, a corporation, nor to any of its members or officers, and places the control of said corporation, including the control of its property and affairs, in the hands of persons wholly without the corporation and in no way connected with it and without in any way giving to said corporation or its officers or members an opportunity to be heard and contest the same.

b. A corporation organized and existing under the laws of the State of Montana cannot be deprived of the possession or control of its property by the Western Federation of Miners, or any other person, corporation or association.

c. The said corporation can be managed by no others than its duly elected officers as provided for by the laws of the State of Montana.

d. The control of said corporation is placed in the hands of others than its duly elected officers.

e. The property of said corporation is placed in the hands of others than its duly elected officers.

f. A corporation organized under the laws of the State of Montana cannot subject itself or its members to the jurisdiction of an authority existing outside of or beyond the control of the laws of the State of Montana. [116]

g. By-laws or constitutions of voluntary associations or any association or corporation cannot have the force of law nor impair or affect rights of property against the will of its real owner.

h. The said amendment to said constitution is repugnant to the laws of the State of Montana.

8. That the said The Butte Miners' Union, a corporation, is interested in these proceedings and in said action in said district court for the reason that its affairs and property are interfered with as herein alleged.

9. That there is no plain, speedy or adequate remedy by appeal from said order of said Court, in this: The property and control of the said corporation is taken from said corporation and its duly elected officers; the control of said corporation and its affairs, property and business are placed in the hands of persons under no obligation to said corporation, and whose interests are directly derogatory to said corporation, adverse in all respects to the interests of said corporation, and who have claimed and who do now claim the property of said corporation as the property of themselves, and who intend to finally appropriate said property to the use of the said Western Federation of Miners, or others, at the earliest opportunity, and who tried to appropriate the same for such use; the said plaintiffs named in said amended complaint, and their officers, agents and servants and persons working in harmony with them, intend to disrupt, disorganize and bankrupt said corporation and they would have said corporation disrupted and disorganized before an appeal could be heard in this court; the said corporation is deprived of the right to conduct its business and affairs granted it by the laws of the State of Montana, and its control, affairs, property, business, rights and privileges are taken from it, as aforesaid the said order deprives each of the said Martin

Seahill, Patrick Lee, Patrick O'Neill, Mike A. Sullivan and Patrick Quigley, of rights and privileges which cannot be corrected [117] by appeal or restored by appeal to them; that under and by virtue of said orders dated June 12th, 1915, and June 14th, 1915, exhibits IX and X hereof, the said Guy E. Miller and the other plaintiffs in said action in said District Court, and their agents, and persons in harmony with them, have taken possession of a portion of the books, records, papers and other property of said corporation and have removed the same from the offices of said corporation and have taken the same into their and each of their possession and control and are using the same as their and each of their own property and deny to the said corporation any right thereto or the use thereof and are converting the said property to their and each of their use and benefit; that the said plaintiffs, particularly Guy E. Miller, and their agents and persons in harmony with them, have caused to be published in the Butte Daily Post, of the issue of June 16th, 1915, a newspaper published in Silver Bow County, Montana, an advertisement which is in words and figures following, to wit:

**“FOR THIRTY DAYS.**

“For 30 days you can become a member of the Butte Miners' Union upon payment of one dollar. Members are worth more than dollars. If you are engaged in the mining industry you should be a member of the Miners' Union. Get in. Get busy. Bring others in. Put Butte on the map again as the



best union town in the country, and help to make the miners' organization the bulwark of the toilers.

"The day of the union knocker and character assassin has passed in Butte. They are the enemies of every worker—they try to create division and distrust. Such men are doing the work of the detectives whether they are paid for it or not.

"The union men of Butte to-day realize how much they need the miners—and the miners need us. Our hand is outstretched to aid them. Today every obstacle in the way of the miners' reorganization is removed, and every labor union in Butte is ready to lend all [118] possible aid. The future of the miners depends upon themselves. United they stand—divided they fall. Which side are you going to take? Do you stand for unity or division? Will you strive to maintain and improve conditions or will you aid in destroying them? Talk is cheap. Show your card.

"Every day's work, with copper around the present price, bring you an extra 50 cents per day because of the union contract. That is some of the union's work—you are glad to get the benefit derived from organization. Keep up your union if you want to keep up wages.

"The union hall is the place to discuss every grievance and shortcoming of the union. Go there to solve the problems of organized effort; learn to co-operate with others. You and the union will both be the better for it.

"Let us profit by the mistakes of the past. Let us take warning from the miserable conditions obtain-



ing in many openshop communities. Let us unite in rebuilding a miners' union that shall be a credit to the workers, protecting their interests, redressing their grievances, making happier their lives.

"In behalf of a happier future, in the interest of all, we urge every worker in the metal mining industry of Butte to join the miners' union. The enrollment book is at the Workingmen's Office in the Carpenters' Hall.

"You need a union—the union needs you. War is hell—so is the open shop. Unite. Do it now.

THE SILVER BOW TRADES AND LABOR  
COUNCIL MEDIATION BOARD.

—Adv."

The said plaintiffs and each and all of them in said action in said District Court and their agents, officers and servants, as shown by said advertisement, are offering to take into membership of said corporation persons upon the payment of one dollar whereas the regulation initiation fee, as provided in the constitution and by-laws [119] of said corporation is five dollars, and they and each of them are claiming the right to and are assuming to say and declare, contrary, to the constitution and by-laws of said corporation and the laws of the State of Montana, who shall become members of the said corporation, and have assumed to dictate and are dictating the policy of said corporation and the affairs of said corporation, and are depriving the said corporation of all rights as a corporation, and are depriving the members of said corporation of their inalienable rights as members of said corporation.

That by reason of said order, relators herein will be greatly and irreparably damaged in this:

That their property is taken from their control, and by reason thereof, they will be unable to secure a meeting place to conduct their meetings and the business of the corporation, pending appeal, and are prevented from going ahead and repairing their said property, which has heretofore been partially destroyed, and the said property will greatly deteriorate in value by reason of delay and the business of the said corporation will be irreparably injured in this:

That the membership will and are refusing to pay dues, for the purpose of keeping up the corporation, for fear that the funds so accumulated, will be turned over to Guy E. Miller and Charles H. Moyer, officers of the Western Federation of Miners, a voluntary association of persons with headquarters in the City and County of Denver, State of Colorado, and by reason of such failure, the aims and objects of the corporation will be defeated and the membership of said corporation, will become demoralized.

That the subject matter of the act, is without the jurisdiction of the Court in this:

That The Butte Miners' Union, a corporation, is not and was not a party to the action referred to, but regardless of which fact, its property and effects are by said order, delivered over to the [120] plaintiffs mentioned in said action.

That by reason of the said order, the defendants in said action, are, "enjoined and restrained from in any way or manner interfering with the plaintiffs,

Western Federation of Miners, of Guy E. Miller, the attorney in fact of Charles H. Moyer, the President of the Western Federation of Miners, in the possession and control of the property of The Butte Miners' Union No. 1, a corporation, for the purposes mentioned in the amendment to the constitution of the Western Federation of Miners, as alleged in the amended complaint of plaintiffs and known throughout the hearing of the order to show cause as 'Amendment No. 2.' "

Further it appears from said order, that the plaintiffs are "enjoined and restrained from disposing of the whole, or any part of the funds of The Butte Miners' Union No. 1, a corporation, now on deposit in any bank in Butte, or from removing the same from the said bank or banks, or from in any manner interfering with the same without the further order of this court," but it does not directly forbid them from incumbering the same.

Relators herein will suffer great and irreparable injury, pending appeal, because of the fact that the plaintiffs in said action are unable to respond in damages in any amount whatever that may be suffered by these relators, because of said order, and by reason of the fact, that the said order does not exact a bond from the said plaintiffs above referred to, sufficient in amount or in any amount to protect them from loss.

That at the time the Court filed its conclusion of law in the said case, request was made, on behalf of the said defendants, by their attorneys, that the Court make an order, compelling the plaintiffs, par-



ticularly Guy E. Miller, to give a bond for the protection of these relators, which request was, by the Court denied and an exception duly taken thereto.

These relators will further suffer great and irreparable [121] injury by said order, which injury cannot be remedied by appeal, by reason of the fact that the action in question was brought against the officers of the Butte Miners' Union, No. 1, W. F. of M., as individuals, but not against the office. That the constitution and by-laws of both the Western Federation of Miners and of The Butte Miners' Union, a corporation, provide the length of the term of said officers.

That during the pendency of said action, the time provided by the constitution of The Butte Miners' Union a corporation, at which nominations should be made, and new officers elected arrived, and in compliance with the requirements of said constitution, nominations were duly made as provided by the said constitution and prior to the date on which the court's conclusions of law were made and filed, and election for officers for The Butte Miners' Union, a corporation, for the ensuing term, was duly held and officers for the term commencing the first Tuesday of July, 1915, to hold for one year, were elected and under the constitution of The Butte Miners' Union, a corporation, the said officers so elected on the first Tuesday of June, 1914, should be installed on the first Tuesday of July, 1915, which is the 6th day of July, 1915.

That by reason of said order, great confusion and



uncertainty will arise when the officers so elected are installed.

These relators further state, that prior to the making of said order, they were by the plaintiff heretofore mentioned, to wit: The Western Federation of Miners and its executive officers suspended from membership, and further assert, that they had voluntarily on or about the 15th day of January, 1915, and prior to the making and filing of the said conclusion of law and the order herein complained of, withdrawn and severed all relations with the said plaintiff, Western Federation of Miners, and its officers, and did thereafter by resolution, publicly sever all relations with the said Western Federation of Miners, and did return the charter and seal received [122] from said Western Federation of Miners, at an end, and did thereafter upon June 15th, 1915, give public notice to the world, by a formal resolution, that they were no longer in any manner affiliated with the Western Federation of Miners, a true copy of which said resolution is hereto attached marked exhibit XI and made a part hereof.

These relators will suffer great and irreparable injury that an appeal will not remedy for the reason that the delay incident thereto, would strike at the very *like* of the relator, The Butte Miners' Union, a corporation, if it did not cause its total destruction, in this: That being deprived of its property and the use thereof, and if the books and records, necessary for the conduct of its business, it will be compelled to incur additional expense in procuring quarters to meet in and the necessary books of record, without

being permitted to purchase the same out of the funds contributed by its members and will be prevented from caring for its sick and burying its dead.

Further the relators herein will suffer great and irreparable injury, which cannot be remedied by the right of appeal, by reason of the fact that a transcript of the testimony is necessary in taking an appeal, and a careful investigation of the costs incidental to procuring a transcript of the testimony from the official court reporter and the printing of the same, and the briefs in connection therewith, will amount to approximately the sum of Eight Hundred (\$800) Dollars.

That these relators applied for an order of court permitting the use of said amount, out of the funds of The Butte Miners' Union, a corporation, or as much thereof as may be necessary for the purpose of appealing from said order, which said request for said order, was denied by the Court, and an exception taken thereto, a true copy of which said order applied for and the affidavits in support thereof, is hereto attached marked exhibit XII, and made a part hereof. [123]

That on the 26th day of June, 1915, a notice of appeal from said order, in said action was duly filed in said court, a certified copy of which said notice of appeal from said order, is hereto attached, marked exhibit XIII, and made a part hereof.

Relators further complain, that they will suffer great and irreparable injury by reason of the said order and the necessary delay in appealing therefrom for the following reasons:

(a) That at present, the relator, The Butte Miners' Union, a corporation, is engaged in litigation with the City of Butte, for permitting the destruction of its hall and personal property by a mob, during the month of June, 1914, amounting to many thousands of dollars. That the said action will suffer by reason of the said order, and the interference of the Western Federation of Miners, through Guy E. Miller, personal representative of Charles H. Moyer. The said Miller, claiming on behalf of the said Western Federation of Miners, the control of the property of the said relator and the rights to conduct all litigation relating to The Butte Miners' Union, a corporation.

(b) That at the present time, the relator, The Butte Miners' Union, a corporation, is engaged in litigation in the Black Hills, South Dakota, in a case entitled, The Butte Miners' Union, a Corporation, Plaintiffs, vs. Charles H. Moyer, as trustee for the Western Federation of Miners, Charles H. Moyer, the Western Federation of Miners, an unincorporated association, Charles H. Moyer, Charles E. Mahoney, Ernest Mills, John C. Lowney, Yanco Terzich, Guy E. Miller, and William Davidson, as members of said Western Federation of Miners and as managing officers and representatives, thereof, and other members of said unincorporated association to a great number represented by said Charles H. Moyer, Charles E. Mahoney, Ernest Mills, John C. Lowney, Yanco Terzich, Guy E. Miller, and William Davidson; also Charles S. Hardin as Sheriff of Lawrence County, South Dakota, and the Lead City



Miners' Union, a corporation, defendants, for the sum of Thirty-two Thousand Seven Hundred Eighty-five and 95/100 (\$32,785.95) Dollars. [124]

That the defendants in said action are claiming that they have been, by reason of the said order referred to, declared entitled to all of the above-mentioned property, of The Butte Miners' Union, a corporation, and in furtherance of said claim, have prepared certified copies of the pleadings in the case of the Western Federation of Miners et al., vs. Martin Scahill et al., and have forwarded them to their attorneys in the Black Hills, for the purpose of using them in evidence in attempting to get control of the said property. The said cause last referred to, being set for trial upon the 2d day of July, 1915, at Deadwood, South Dakota.

That by reason of the said order and the delay incidental and necessary to take an appeal, these relators will be prevented from procuring the necessary money to secure the presence of counsel and necessary witnesses to properly protect their rights at the trial of the last mentioned case.

That after the rendition and entry of said order of June 14, 1915, certain of the individual respondents and defendants herein, aside from said court and judge, did file in said court and cause, certain petitions and affidavits wherein and whereby said respondents and defendants, aside from said court and said judge, did and do seek to have all of your relators and plaintiffs aside from said corporation, tried and punished for an alleged contempt, consisting generally in this, that they have since the rendi-



tion and entry of the order so made, carried on and conducted the business of The Butte Miners' Union, a corporation, Relator herein, and that unless restrained or properly directed in the premises, said court and said judge will proceed to hear said matter and proceed to determine the same; that the alleged acts of your relators and plaintiffs, for which punishment of the alleged contempt is sought, arises from alleged acts performed, not under their individual and sole capacity, but as officers and agents of the corporation, relator and plaintiff herein.

[125]

Relators and plaintiffs herein will by reason of the order so made and entered, as aforesaid suffer great and irreparable injury in this:

That the respondent and defendant Guy E. Miller, as the personal representative and attorney in fact of Charles H. Moyer, President of the Western Federation of Miners, is by reason thereof, attempting to usurp the name of the relator The Butte Miners' Union, a corporation, and as above set forth, has been and now is calling for recruits and volunteers by alleging that he is building up relator, when in truth and in fact he is attempting to destroy the relator, The Butte Miners' Union, a corporation, by attempting to create and establish a rival miners union organization, while giving it the name of said relator, The Butte Miners' Union, a corporation, and unless prevented by this court will usurp the name of the said The Butte Miners' Union, a corporation, and will usurp the rights and privileges of the said The Butte Miners' Union, a corporation.

10. That this affiant makes this affidavit for and on behalf of all of the relators and plaintiffs in this proceedings.

WHEREFORE, your relators and plaintiffs herein respectfully submit that this court by its orders and mandates should supervise, or in other and proper legal manner efficiently direct the said court and the judge thereof in the premises, and that this court should by the exercise of a supervising mandate, or such other mandate as may be proper in the premises, expunge, suspend and annul, revise or correct the said orders of said court dated June 12th, 1915, and June 14th, 1915, exhibits IX and X hereof, and that this court should by the exercise of a proper mandate in the premises review the said orders of said court and declare the same annulled, and make such mandate and direction unto the respondents and defendants herein as shall seem meet and proper.

And these relators and plaintiffs herein respectfully request [126] and pray that this court grant unto them any such order or orders as may be meet in the premises, and such further adequate and sufficient relief as to this court may seem meet and just in the premises.

MARTIN SCAHILL.

Subscribed and sworn to before me this 26th day of June, 1915.

[Notarial Seal]

PETER BREEN,  
Notary Public for the State of Montana, residing at  
Butte, Montana.

My commission expires June 2d, 1916. [127]

## EXHIBIT I.

KNOW all men by these presents: That we the undersigned, residents of Silver Bow County, Montana, Territory pursuant to a resolution of the Butte Working Mens' Union (whose name has been changed to that of the "Miners' Union," being an association of Miners and others) adopted at a meeting held for that purpose in Butte City, of said County and territory, prior to the signing and ensembling of these presents, which resolution is as follows, to wit:

"Resolved, that the trustees of the Butte Working Mens' Union, to wit: Eugene D. Sullivan, Charles S. Shoemaker, Michael Grose, James Cardigan, and Henry Rodda be, and are hereby authorized to incorporate this union, and for that purpose to file with the proper officer such certificates as is required by law; and that said trustees shall conduct the affairs of the corporation so formed until their successors are elected at the next annual election held for that purpose," do this day hereby associate ourselves together for the purpose incorporating said association under the laws of the territory of Montana: That said association shall be known by the corporate name of "Miners' Union," and we hereby certify that the objects for which this corporation is founded are: To protect the interests of the membership of said association, and to enable it to hold such property as may be necessary for the protection of its good and the advancement of the interest same, and to enable it to establish subordinate organizations and to become a body politic and corporate in law and to this end.

1. The property of said association shall be held by the trustees thereof, and their successors in office, as such, with the exception of money, which shall be held by the treasurer of said corporation.

2. That the trustees shall have power to sell, loan or mortgage any real estate or other property the corporation may have, or may hereafter acquire, for the purpose of enabling said corporation [128] to erect and maintain a Hall for the meeting of said society, to wit: The Miners' Union.

3. That the trustees shall have power in their discretion to issue stock which shall be unassessable, for the purpose of building and maintaining said Hall, but said stock so issued shall not exceed in amount the sum of Ten Thousand Dollars (\$10,000).

4. Said incorporation may at any time, provide itself or the public with a public or private library, and may lease or rent any portion of any property owned and not otherwise used for said purposes.

5. Said incorporation shall have power to sue and be sued, to plead and be impleaded in their corporate name.

6. Said incorporation may have a seal which may be changed at pleasure.

7. That said trustees shall hold their office until the first annual meeting in March, A. D. 1882, or until their successors are elected, and that thereafter a board of trustees, consisting of not less than *five*, nor more than *nine*, who shall be members of said society, or incorporation, "The Miners' Union," shall be elected for the period of one year, or until their successors are elected, and that in case of any vacancy



happening in said board of directors said incorporation shall have power to elect one or more of its members to fill each vacancy or vacancies, at any meeting after the happening of the same: That as soon after the election of said trustees, or any of them, as maybe, the President of said incorporation shall issue under his hand and the seal of said incorporation, a certificate of election to each of said trustees so elected, which shall be good and sufficient authority for authorizing said trustees to act for said incorporation.

8. Said incorporation shall be subject to such rules and regulations as it may now have for its government, or may hereafter enact, provided they are not contrary to these Articles of Incorporation,  
[129]

9. Said incorporation shall have power to establish branch organizations, which shall be subject in their government to the rules and regulations of this society, to wit: "The Miners' Union," but in all other particulars they shall be free and independent; That when any nine persons desire to establish a branch organization they may apply to the President of the Union, who may, in his discretion authorize the institution of such branch society, and shall, when so established, grant to said branch society, a charter, signed by himself and the Recording Secretary, and attested under the seal of said incorporation.

10. That the private property of the members of this incorporation shall not be subject to the corporate debts of the same.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 16th day of April, A. D. 1881.

CHARLES S. SHOEMAKER	(Seal)
EUGENE SULLIVAN	(Seal)
MICHAELS GROCE	(Seal)
JAMES CARDIGAN	(Seal)
HENRY RODDA	(Seal)

Territory of Montana,  
County of Silver Bow,—ss.

On this 18th day of April, A. D. 1881, before me, the undersigned, a Notary Public in and for the Territory of Montana, personally appeared James Codigan, Eugene Sullivan, Henry Rodda, Michael Groce and Charles S. Shoemaker to me personally known to be the persons described in, and who executed the foregoing instrument, and who severally acknowledged that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Notarial Seal on the day and year in this certificate above written.

(Signed) CHARLES S. WARREN,  
Notary Public, Montana Territory. [130]

## EXHIBIT II.

That—Whereas, “The Miners’ Union” was duly incorporated on the 4th day of May, in the year A. D. 1881, under and by virtue of the laws of the Territory of Montana, Articles of such corporation having been filed in the office of the County Clerk and Re-

corder of the County of Silver Bow, "THEN" The Territory of Montana, on the said 4th day of May, A. D. 1881, such corporation to exist and continue for the period of Twenty years from the said date, and

Whereas—The President, Secretary, and Board of Trustees, of said corporation "The Miners' Union" have by and with the consent of more than a majority of all the members of said corporation, in writing first obtained, elected to continue the existence of the said corporation, "The Miners' Union" under the provisions of the Civil Code of the State of Montana, applicable thereto, as Approved by the Legislature of the State of Montana, and as provided by Section 400, of the Civil Code of the said State of Montana, and,

Whereas—Such consent in writing of more than a majority of the members as aforesaid has been duly had, and a certificate of the proceedings thereon duly certified to by the President, Secretary, and Board of Trustees, of The Miners' Union, said corporation, has been filed with the County Clerk and Recorder of the County of Silver Bow, State of Montana, and a certified Copy thereof filed with the Secretary of State of the State of Montana.

Now—Therefore, We, the undersigned composing more than Two Thirds of all the members of "The Miners' Union" said corporation Hereby ASSENT in writing, and REQUEST, That the corporate existence of THE MINERS' UNION, be and the same is hereby extended and continued for the period of Twenty years from and after the period for which it

was formed, to wit: Twenty years from the 4th day of May, A. D. 1901.

And we hereby authorize, and empower W. H. Eddy, President, Frank O'Connor, Secretary, and William H. La'Duke, J. J. Quinn, F. W. McKewn, Charles O'Brien, and John Shea, Trustees, of "The [131] Miners' Union" said incorporation to do every act and thing necessary to be done in the premises, as aforesaid, for the purpose of extending the period of existence of said corporation, twenty years from and after the expiration of the period for which it was formed, and we hereby give our consent in writing to such extension, of said corporation, as aforesaid:

In Witness Whereof, we have hereunto set our hands this 30th day of November, A D. 1900:

W. H. Eddy, Frank O'Connor, Ed. Reese, Jerry Hanley, Pat Mitchell, Joe Allemandi, James P. Martini, Grant A. Ballon, Quinn J. Murphy, James Mahoney, P. F. Boland, James Maher, Michael Donahue, Ed. Hughes, Mike Greene, John Murtha, Thomas Carroll, D. J. Hannifan, Michael H. Mooney, H. B. McMillan, Paul Sheehan, Pat Smith, Pat Sullivan, George Vukoevih, Dan Harrington, Gio Gonterio, James Negro, Peter J. Scoles, Arthur Dutcher, William Haterty, A. G. Hickok, Pat McGrael, Jerry Sullivan, Mike O'Connor, F. W. McKeon, William Bowden, John R. Murphy, John Nagle, John Dempsey, Pat Peoples, Joe Shannon, Joseph Calloway, Fred Haul, James Kilrain, W. H. Ward, Eugene McNellie, Thomas O'Connor, Mike Laughlin, Mike Kellaher, W. H. La'Duke, Richard Dewyer, Mar-



tin Celico, Charles O'Brien, Mike Hart, John Wilkinson, M. J. Mooney, William P. O'Neil, John Shea, Tim J. McCarthy, Robert K. Boyd, Mike Spoo, W. Vucen niler, James Castri, William Ralph, John McGuirk, James O'Rourke, Pat Sullivan, Peter Schaletz, Joseph Long, P. J. McNamara, Charles Allen, W. J. Weeks, Hannibal Berryman, Joe Childs, John Culbert, John Thornton, Michael McCormick, Thomas Kalliher, P. J. Lally, James P. Brown, John Hayes, John Casey, Peter Casey, Patrick Brogan, Eugene Sullivan, Richard Butks, Edward Banahan, Michael F. Cannon, Pat Peters, Gilbert Wilson, Eug. Riordan, Jerry Cannady, Lee Rice, John J. Stafford, Thomas Bragel, Geo. Wilson, W. H. Barry, Pat T. Shea, J. J. O'Neil, John Masy, W. J. Mest, John Honey, James Morrissey, James Kinney, W. M. Wing, Nick Ayers, Mike Rines, Thomas Caughlin, Antone Gussie, Peter [132] Pilo, Onreitti, Commaso, Vesco Joh, J. J. Fitzmorris, Thomas J. Kennedy, Wm. Britt, Mike O'Neill, M. J. Kieran, Pat M. Monahan, Thomas Scanlon, M. McGlyn, William Murray, H. J. Bush, Peter McNulty, Marti Costello, Thomas Mash, John Bennett, Ed. Kane, Tom Cole, John J. Flanagan, Denis F. Clark, Joseph Burke, Mark Ryley, Thomas Casey, James Kearney, John Holland, Richard Farrell, M. Connors, John McGinniss, Peter McDermott, Lawrence Doyle, Peter Doble, Pat Boyle, Wm. O. Veal, W. Mulcahey, Robert Kelley, James Dolan, Roy Henderson, Richard Kane, Pat Flarity, James Fitzgerald, J. P. Smith, G. L. Gunn, Pat Gallagher, Michael Ruddy, Fred Tramell,

Thomas Aurran, Dennis Mehan, Joseph D. Cannon, Pat Fahey, John S. Scerz, Matt Mahoney, Chiro Schmille, Walter Ellis, William Hoy, John Joy, James Moriarty, S. T. Taylor, Barney Fury, John Cavanaugh, Jerry Donohue, Bart Shannon, M. T. Scott, Jerry Sullivan, Owen Barnes, Pat McGovern, James Hickey, Nat Walsh, Larry Dorsey, John E. Sloan, James Clark, James McNally, Sam Toy, Dave Walsh, Mike O'Connell, Quinn Sullivan, Pat Gallagher, Pat Lannon, John Beck, D. B. Murphy, James P. Cole, John Rider, E. Muhillo, Thomas Bren, Thomas Casey, J. B. Leary, John McGarrell, Joe Stran, James H. Sullivan, William Quinn, Daniel Monnihan, John E. Larkin, Martin Hagan, George Halpied, Thomas Devine, Pat Kelly, Lee Oldenorff, A. B. Williams, Gus Nelson, Joe Sullivan, Andrew Dangan, W. Mahoney, Denis Dllea, M. Collins, Thomas J. Hoar, Brig Pollock, Robert Bennett, Aug. Harkins, James H. Smith, Martin Martinson, Emanuel Willcocks, Martin Mallik, Robert Nelson, Ulive Stefane, John Cuttes, William Rodda, James Pascoe, Thomas Webster, John Leonard, Archie McPhail, George Pascoe, Patrick J. Lyden, Joseph Hocking, James Lyons, John H. Thomas, Charles Treloar, Christ Roe, John H. Wier, B. E. Nowlin, Quinn Sullivan, Frank Brandt, John Praee, S. J. Perry, P. J. Martin, James P. Sullivan, Dan McBride, Henry Matthews. Henry Treglon, John Flavin, E. W. Cassel, Josiah Lawry, Phillip Burt, John Williams, W. O. Monahan, D. McCabe, R. J. Williams, [133] James Holman, Thomas Kelley, Michael Deevy,

Thomas Robinson, Ole Anderson, W. J. Ward, James Lemmon, Thomas Flannigan, John Robinson, John Pomeroy, W. G. Dougherty, Matt Hammond, W. L. Matherson, Daniel Thomas, E. Parks, James A. Golden, A. Matson, John Cook, Pat S. Murphy, John Vander Ghote, Alfred Pouston, William Stride, O. A. Stroseman, John Uren, Roy Marks, Maurice Lalande, William Davis, Piter Kyse, Thos. Morcom, A. Callaghan, James Kitto, Pat Kennelly, John Varker, William Partell, H. Miema, Alex. Hueston, G. L. Williams, James M. Williams, Mat Gala, John Keskeys, William Verran, Martin Stephens, W. H. Combellick, Antonio Boneiel, Ernest Kimmal, Peter Cercone, Geo. Sandow, Tim Twomey, John Wilson, Frank Johnson, Charles Wallard, Richard Ralph, James My Davies, Jos. Robetts, James Downey, Denis O'Connor, John Grentz, H. E. Opates, John Osborn, Con Boyle, Harry Pascoe, Levi Atkinson, Charles C. Johnson, Sam Ward, R. J. Collin, Mike Gleason, William Flynn, Allan D. Cammeron, Steve Vargo, Lawrence Gargan, John Hivala, P. J. Shaw, James Harmand, James Casey, John H. Harrington, John F. Burke, Bery Shayffter, David Dtson, Con E. Monaghan, John Kilpatrick, Stephen Davis, Charles Ashford, John Glagher, William Ellis, John K. Murray, Mike Hughes, Joseph Berard, Michael W. Walsh, John F. Sheridan, E. Downing, E. J. Walsh, Vidor Virra, Peter Sodae, Henry Rundle, Fred Laning, Z. Bardwell, E. J. Smith, Archie Gavan, James Gallagher, F. J. Vedis, Charles Bate, J. F. Mur-



phy, Sam Turks, Ed. Shanahan, William Rich, J. S. Eagle, G. D. Henderson, Joseph Meany, Frank Myers, John P. Cunningham, James Hickey, Pat Shield, Thomas Holman, Patrick H. Drummey, James C. Casly, James H. Murphy, Joseph B. Hughes, Harry Williams, J. B. Hart, George Heaman, James Trythall, James Desotte, John Vichery, James O'Donnell, Samuel Coombs, W. C. King, B. J. Walsh, Sam Maittille, James Spargo, Bart Kearins, Albett Rice, James Brogan, Jerry Burns, Denis Lynch, Pat May, Sam Osborn, Adam Johnston, Dan Drew, Mike Hogan, Dan O'Brien, Peter Harrington, George Ott, Timothy [134] Spilland, M. Toner, Charles Bone, Jerry Holland, T. J. Booher, John M. O'Neal, John Rinaldo, Charles McDevitt, Peter J. Sullivan, Ed. Hasley, Michael Dwyer, A. Koschitz, James Moutin, James Scahill, Geo. H. Tole, James Crowther, J. D. Donohue, James Roberts, M. C. Huffman, Frank Riley, James Jenkin, William Kelly, Alfred Temby, James Althouse, Joseph Gainer, Henery Jewell, Thomas Olds, George Tippet, William Kitto, William F. Dunstan, Frank Williams, Robt. Thomas, Herman Bergquist, Joseph H. T. Harris, Peter Kamiaium, James O'Herrin, Francis Howe, Jerry Leary, L. J. Cruickshank, John B. Scott, Wm. B. Daly, John J. Quinn, Tim Driscoll, William B. Sperry, Thomas Waters, James Holland, Geo. P. Schelinsky, Thomas H. Bray, John M. Hanley, James Noerthy, B. F. Knox, W. J. McDonald, F. J. Toohey, John Hayes, John Walsh, Martin Smith, Z. V. Bell, Jerry Sullivan,



Con Sullivan, Dick Toohey, Can C. Sullivan, Paddy Ryan, Jack Sullivan, Wm. Fauell, Silverter Downey, Dennis Sullivan, Dennis Sehea, Patrick Shea, J. James, Tim Burns, Jack Burns, Con Ryan, J. Faran, D. Kennedy, Thomas Henry, F. Switzer, John McDonald, John Mahan, Mike Sullivan, Mike Garry, John Banbiben, John Downey, Moses Downey, Dinney Gaviny, Wm. Terzise, Thomas T. Ellis, Charles Ellis, William Harvey, George Thomas, John Harvey, William Eddy, J. Clemens, John Sparge, J. Ryan, John O'Brien, Peter Gibeens, Thomas Shault, Richard Schault, Benjamin, Shault, J. Comba, J. Sullivan, John Holland, James Lowney, Henry Conroy, Con Sullivan, John Ayers, Tim Sullivan, John Pierce, Mike Sullivan, James Thomas, Thomas Richards, Robt. Blackmore, Jerry Harrington, Mat Cooney, Thomas Delaney, Pat O'Donnell, Dennis Sullivan, Chars Ferry, Frank Schuddieck, Patrick Moher, Paddy Conaway, Dick Carney, Maurice Carney, E. O. Packard, Phil Brogan, James McGarvey, Joe Joy, Frank Greeleey, Hugh McBride, John Gallagher, Larry Duggan, Pete Haland, Owen McBride, John Call, John McLaugh, Pat McKinley, Joe Meaney, S. W. Carney, Patrick J. Kelley, Pat Hannifan, Philip Holman, J. S. Murphy, [135] Dennis Lowney, Jerry Harrington, John J. Lynch, John Crowley, James Lowney, Tim J. Lynch, Robert McCoory, Frank McCooley, John Morrinson, John Welsh, John Murry, Hugh Morrinson, Pat C. Sullivan, Con Sullivan, M. J. Harrington, Philip Sheehan, Jerry Harrington, Frank Cozzay, M.

Coleman, Dennis Holland, William J. Eddy, N. Bowdin, James F. Neary, John J. Myrray, William Odgers, M. M. Sullivan, Chas. Allen, Pat Lavelle, Thos. Malia, T. W. Dweller, C. A. Payton, Harry Blum, Jerry Sheehan, James Meehan, Barnet Fitzpatrick, Joseph Ham, Mike D. Sullivan, George Zambelick, Bianco Francisco, Ed. Dulong, Frank McKigul, Dominick Gernof, Con Mattee, Phillips Roberts, Rober O'Neill, John Ochk, James Ryan, H. W. Robinson, W. H. Kellett, J. P. McCarthy, John Hanley, Mike Quirk, W. T. Williams, Julius Steinborne, Truman Humes, Stephen Eva, William Walsh, William McKeon, Maurice Fitzgerald, Pat McCarthy, Michael Martin, Thomas McCart, Thomas W. Bradley, Pat Sullivan, Jamed Couch, John Drawford, Antony Scott, Frank Connelly. Dan Courtney, W. Williams, Charles Tonkin, Lawrence Abbott, William Nankivell, James W. Tippet, Alwx Make, James Connors, Mark Holland, William Commings, Thomas Castle, Thomas Drew, Evan Morgan, John F. Opie, Thomas Rodgers, George Blackisk, Albert Hunter, John Andrew, Joe Lasage, James M. Grant, Chas. F. Murphy, J. J. McMaohn, Ed. Connors, John Hallinan, Phil Sheridan, Kemp McKeen, John Kutsen, John Murpny, James Flannigan, J. B. Furey, William Hosking, Symon Hawke, Antonio Bertoglio, William Quealy, George Roletto, Dominick Roletto, August Moieson, Erick Long, M. B. Shea, Pat Duffey, Peter McDonald, Frank McKennah, Arthur Gratton, John Millihan, Michael P. O'Shea, John Malloy, George Slooom,

Pat Bresslin, John McGinley, Andres O'Brien, Henry Donston, Richard Wills, Richard Jenkin, Andrew Heth, James Donnelly, Pat McDonnell, W. L. M. Jones, H. A. Irvine, Thomas H. Tomkin, John Wm. McGraw, Frank Higgins, San Evan, [136] A. J. Sholes, Edwards Stane, John Edlar, James Mulholland, Dan G. G. Craig, Mike Jovice, John Delancy, Fred Blewett, James McGuire, W. Trudeau, James Gleason, P. S. O'Brien, Bert Macdonald, Mike J. Sullivan, John J. Harrington, E. B. Cook, William Carbenter, Jerry Kelley, T. W. Heaterley, Charles Fournier, Mike Shea, M. Quill, Martin Hanley, Pat Bonner, G. M. Comperetto, Jacob Torneo, Martin O'Rourke, D. D. Sullivan, Frank L. Reber, Patrick Stenson, Peter Doble, James R. McGrath, Maurice Hartnett, Tim Leary, John H. Sullivan, Simon Curtin, John W. McGuire, John E. McDonald, John McCormick, John Eatherne, E. J. O'Donnell, Alec Pauher, John T. Kelley, A. B. Cummings, William Crigan, Tim Shea, Charles Mtson, Charles Bone, Ed. Monnghan, Dio Conterio, Peter Callo, Abel Sulin, Martin Fox, John Sheehan, Dennis Harrington, Robert Currin, George M. Good, Mike T. Harrington, John Connell, C. J. Allen, Jerry Lynch, Pat Doyle, John Wilton, James Caly, John Mickle, John Boat, Dennis E. Sullivan, Peter Harrington, U. Clark, George Bopp, Owen Boyle, James O'Boyle, Steve Roach, Thomas Fill, John Logie, M. J. Haley, John Rippir, J. H. Steinborn, Frank Downing, T. J. Kiley, Thomas Sattrley, Tom Conway, Dennis



O'Neil, John Roberts, Domenico Croglia, Bart Sullivan, Ben Thomas, Owen Murphy, James Kerrey, Andrew Hill, J. J. P. White, W. D. Moore, John B. Murphy, Mike Sullivan, Stone. Adolph, Perton, J. M. Murphy, Mike Murphy, John Doran, John H. Mullin, Sam Arthur, Thomas H. Ball, John B. Gallon, Pat Gallagher, Thomas Gleason, Lawrence Byren, Amus Jay, C. X. Lousdale, Pat Casey, John Griffin, Joseph Calloway, Tom Corbley, John Lindore, John Winne, John McGlynn, William Seymour, Thmos Caslin, Martin Dempsey, James Spargo, John Snow, James H. Thomas, William Tucker, Joseph Fayne, Thomas O'Neill, Thomas Mulrone, John Callow, Tim Flagan, Tim McNamara, Thomas Barrett, Con D. Sullivan, W. H. Oliver, Walter Rudolph, Pat Mead, Peter Millen, Emile Bouthittier, Peter Meehan, John J. Driscoll, Jerry Shea, Pete McGream, Pat D. Sullivan, William Tregear, John Leary, Henry Crestello, Tim T. Sullivan, W. F. Brennan, [137] M. L. Francis, Anserw Wickeren, J. W. Doley, Thomas Dolan, Tom Mullarhey, Patrick E. Rooney, Con E. Murphy, Alex Poikela, J. J. McIssac, Dennis Lener, Paul Germoltz, George Burg, William James, Henry Luiker, Dan Murphy, Dennis Hurley, Steve Richards, Thomas Blythe, Walter Bradeshaw, James Fitzgerald, Robert Mackie, James Bortoglio, William H. Sweet, T. K. Mullane, Frank Jinks, John C. Sullivan, Dan D. Shay, Jerry Buckley, Thomas Cummings, A. Jeargl, Meansy, James O'Leary, E. J. Giberson, R. Angove, Isaac Anunte,



James B. Ford, John Jagoa, James Mulligan, Thomas Bailey, Same Bolitho, Joseph Bishop, Ed. Billings, H. H. Brown, David T. Evans, John Blewett, John Harrington, Sam Wear, Antone Timmetti, Andy York, Thomas Wright, Sampson Symonds, John Welch, Harry Trenberth, J. P. Crowley, John H. Griffin, Sam Daoust, Thomas Deelan, Hugh Ferry, Thomas H. Evans, Paull Racca, W. F. Packard, James Walle, John Ryan, R. J. Bean, A. D. Schweninger, B. Berloyle, Antone Croylio, Chas. Bonning, Dominic Gibbons, James Powers, Maurice Powers, Ed. Grose, Henry Wasley, Joseph A. Thomas, Richard O'Conner, John H. Harrington, Michael Harrington, A. H. Sieg, James Driscoll, Ole Honson, Murray McMullan, Flurry J. Sullivan, C. Young, Thomas Kelley, Peter Shea, William S. Cannon, William H. Da Land, John William Lusk, John Veals, Ed. Christian, D. M. Lowney, Nich Farystic, Martin Hennessey, John A. Barrett, James Hocking, K. W. Simpson, James Bennetts, Frank Smith, James McBride, Pat Gildea, W. R. Smith, J. H. Sultz, Thomas Lenihan, Con M. Kelley, William Tippet, W. A. Fogarty, Anthony Coggins, Pat C. Doherty, William Cardwel, Thomas R. Shealy, Edgar Campbell, Dick McIntyre, Pat D. Sullivan, Pat G. Sullivan, John Cotter, P. J. Callish, Earnest F. Foster, T. M. Mynch, George Tippet, Mich Hermanson, Ed. Lund, James J. Duigan, Hugh McAhon, William Ralph, John Caddy, R. Payne, R. H. Hocking, Frank Lawber, Thomas Thomson, Walter Lawrence, Timoth Driscoll,

Henry Ryan, John Zochmons, Owen Parker, Fred Clemo, George Bano, [138] Thomas Benashan, Frank Martinich, William Wawke, Thomas Howard, Barney Curran, Thomas C. Murphy, M. Gallo, James Voeva, Doninic Rolando, A. Lukes, F. Walters, Alex Mizelson, Pat Waters, L. H. Baxter, Ed. Rafferty, Dan Harrington, Nicholas Kent, William Harris, Andy Caufield, Mat George, John Filo, James McSweeney, Mike Harris, Mike Murray, John McRae, Lewis Eakley, G. R. Raine, John Watson, D. W. Wheeler, Ed. Gillmore, John Gilbert, F. J. Byrne, Henry Marchiado, Didrick, Ansinow, John Linder, Peter McBride, John Blythe, Richard McBreen, Garrett T. Sears, Austin Prendergast, James Johns, M. M. J. H. Burke, David Clifford, Ed. Bassett, Pat Murray, John B. Brannan, Oliver Shallow, James Vesco, Lewis Matenncei, Anton Biojak, Pat Powers, M. J. Dariner, Charls Caddy, Mike Hurley, M. J. Connors, Mike Callahan, Martin H. Quinn, C. H. Engenken, James Bowland, Thomas Sheridan, Peter De Bon, W. C. Schult, J. P. Leary, William Connors, Neil McGenty, Chris Sticiph, Thomas R. Bryant, John Kelley, J. M. Greene, Con McFadden, John Meleher, Thomas O'Brien, H. Ray, Frank J. Farley, Ed. J. Lowney, William Bustalir, Richard Drew, John Klume, Thomas Richards, George Tal-lon, Fred Rockow, Steve Murphy, Frank Ghella, John F. Williams, Lewis Woolcock, A. D. McMillan, H. Nicholas, A. Murrish, H. Nentrick, John Kearney, Larry C. Suller, William Merrill, William J. O'Brien, Tim Kelly, M. C. Harrington, Con T. Har-rington, Pat C. Sullivan, Mike Murphy, John Sulli-

van, Guy Newkirk, Lazer Klimovich, O. F. Grant, David Hogan, Pat Dunn, Tim Leary, Peter Dolan, John Carr, James Bary, J. D. Bamy, Con S. Lowney, Ed. Flinn, Pat J. O'Neill, Henry Runlich, Mike Haney, Burt Jackman, Tom Rooney, John Hamilton, Frank Mitchell, James H. Burrows, Ed. C. Crase, William Donahue, Will Philips, W. J. Carbis, Mike Stanton, Samuel Smale, Thomas James Hicks, Thomas Rundle, Henry Jones, John Fitzgerald, Dan Johnston, Charles N. O'Donnell, James Sheppard, Frank Robla, Joseph Roberts, Frank Hart, Joseph Gill, Jerry Nagle, Maurice M. Murphy, Mike Keefe, L. Baesenti, Pat Walsh, Valentine Sheehan, Thomas Carrig, Thomas S. Wore, William Flynn, Gust Kakila, William C. Roberts, [139] Larry McMahon, Pat Finnegan, Frank Oziorg, Alex Newman, Lee Johnson, Michael Prindiville, J. O. Hokola, James Crase, Matt Sullivan, John Keegan, Peter Moynihan, Mike Feeney, C. A. Trucand, Mike Shea, N. P. Thomas, Samuel Baten, W. J. Tervithick, Mike Dempsey, W. S. Murphy, Mike J. Murphy, Martin Doyle, Jim Dwyer, Charles Call, Jame Willoughby, Pat Scanlin, Mike Lowney, William Volker, T. J. McCauliffe, Ed. G. Kennedy, John Cumba, Isaac Johnson, William Collins, Sam Savage, R. Walter, J. C. Day, John H. Hicks, William F. Ward, Dennis J. Coughlin, John F. Dwyer, Thomas Griffin, Robert Maguire, R. E. Maguire, J. C. Drew, Ed. Farrell, Pat King, John Ghella, Joseph Rodgers, Dennis McGown, Geo. Upton, Dan Shea, Timothy Ryan, Pat Leahy, Harry Bone, Con Murray, J. Sumek, William King, William Butte, Milan Leptich, John P.



Byrne, Mich Blelich, John Bradley, James Bradley, Bartlett Bound, John R. Williams, John Whelan, Jerry C. Sullivan, John M. Sullivan, Frank Kennedy, Charles O'Rourke, Pat Graham, John C. Lynch, W. L. Smith, Con Dennehy, Mike Dennehy, Ernest Body, John Lenihan, John Coyle, Dennis Sullivan, Jerry C. Donovan, Richard Reynolds, J. J. McHale, W. Bowden, Dan Cohan, William J. Rodda, James Murphy, Dan Harrington, Hugh Hynes, Harry Tyack, John R. Sullivan, T. H. Bradey, H. A. McManian, Owliver Downs, Richard Dwyer, Edward Walsh, Joseph Hurby, Hugh McEnany, Ed. Kelleher, Andrew Kiley, Patrick Martin, William Hogan, Dan Harrington, Alex Berker, Peter Spuhar, John Gerzovich, William Casey, Pat Ward, Mike B. Sullivan, Jim Walsh, James Graham, Pat Holland, Pat Harrington, Thomas R. Murphy, James Reynolds, Con Toomey, John Herrin, Pat Sloan, M. J. Dooley, John Dennehy, Joseph Riley, John C. Donlan, John H. Riley, August Maddean, John Terney, John J. Kelly, Pat J. Clifford, J. Greene, Michael Boyle, Moses Penny, John Judge, Patrick Mullin, John Donohue, Frank Schoz, John Lot, Thomas Murphy, C. T. Murphy, Jeff Sullivan, John Newell, John Brown, Edward Jones, E. Johns, Pat Harrington, C. J. Shea, D. J. Sullivan, Tim Dwyer, Dan Downey, Mike McCarthy, John J. Donovan, [140] Michael Brennan, Dan Donovan, James Brown, Dan D. Shea, Edward Thomas, Andy Anderson, Thomas Anear, James Argall, Jacob Caro, J. James Chatham, John Cook, Thomas Estlick, Elijah Fall, John Finneagan, Jacob Kaars, Thomas Boland, Botholi Sebastian,



James Ryan, Mike Woods, A. E. Stoddard, Emanuel Wilcox, Lewis Sundin, Le Buckley, Jerry J. Lynch, Alex McCann, P. J. Driscill, Joe Barrett, J. Ferome, Jacob Torniz, James P. Brown, John Mack, Angel Bugiroli, Charles Bazzetta, Pat Dougherty, Samuel Waters, Barney Farrell, Edmund Sampson, Charles Erb, William Edwards, Fanehir, Richard Bray, T. T. Richards, John F. Gerry, Ed. Dingle, M. D. Neary, George Buckley, Arvid Pakkala, Dave Nobel, Francis Tubman, T. J. Moran, Andrew Daly, John J. Donnelly, Mat Kelloniemi, John D. Williams, M. J. McFadden, U. Quinn, Herbert Tredinnick, M. N. Deehan, Pat Clarey, John C. Lowney, Andrew Ryan, P. H. Canieslel, Anthony Shovlin, Mike Sheehan, Emmet R. Carroll, A. E. Cox, Anthony O'Mally, J. R. Fay, Walter Kemaugh, Joseph Mann, W. D. Eddy, Mike Murocy, George McGown, L. J. Baxter, Chas. Ferracy, Homer Locker, James Fitzgerald, Con J. Buckley, Dan Buckley, Edward Myle, A. J. Sigg, Sam Hill, William Hendy, W. H. Jones, W. J. Medlyn, Ed. McCoy, Joe McGinnis, John S. Mixon, William O'Malley, Joseph Hogan, John Catela, John Chero-vich, Laso Budech, James Ingraham, W. T. Williams, J. D. Hayes, Mike Dunn, George Winn, Pat O'Brien, Clarence Olda, Sam Oliver, Mike Piano, John Pierce, George Qaly, Frank Ritter, Andrew Nikkola, John Rock, George E. Matin, Claude Becker, Murty Sullivan, Park Bush, William J. Tallon, Charles Kaski, Dennis Toomey, Dennis Dennedy, John Koba, John Burke, John P. Leary, Hugh Hutchinson, Jacob Maenpa, James Lamrey, Harry Mellott, John Nanrervis, James Murray, James Goggan, Jerry X.

Lowney, Maurice Downey, William C. Downer, Jeff. Nughent, M. J. Dunn, D. D. Shea, T. J. Lyons, John Keefe, John Coggin, J. S. Goforth, Mike McCarthy, John J. Sullivan, William McFlynn, Richard Kicks, Martin Blomquist, Jerry L. O'Neill, J. M. Wills, Mike C. Sullivan, John Foley, Joseph [141] W. Johnson, Alfred Angove, James Axford, Dan Craig, James Dwyer, John Hanraty, John F. McGuire, James Sullivan, Hugh McGarvey, B. Angwin, Martin Dougherty, John Murphy, Maurice Griffin, Mike Reardon, Mike Glynn, William J. McGowan, Thomas Toy, Paul P. Muier, Trenc Valogor, Wm. Flemming, William Hughes, John Noona, John James, Em Polglass, Stephen Eva, John Cottell, Joseph J. Vincent, Tabi Seppanen, John Lynch, Rd. Gartrell, John Loyd Jones, Joseph Perce, Thomas Duggan, John Andrew, Con McDee, Dan McGarvey, Joseph T. Riley, Thomas Caserly, Peter Savoia, J. C. Clavum, James McGarrey, Tom Scanlon, John McAvoy, William O'Brien, J. J. Thomas, James J. Ryan, William Eva, Thomas Eva, John Gilbert, Sampson Doble, Charles Arratta, James Sullivan, Ben Thomas, Mike Sullivan, John Hart, Dennis Murphy, Ton O'Neil, John Henratty, J. C. Hanley, Dan D. Sullivan, Dennis Kennedy, William Eva, John P. McGuirk, Con Boyle, William Amrose, W. H. Price, Pat Bennett, Alfred Bunt, Ben Liles, David Moody, Pat O'Leary, Edwin Trevena, F. B. Tydd, Jas. McHalen, W. T. Moyle, John Bono, Edward Garrando, Josiah Cooking, Peter Sameram, William Williams, Paul Capvis, Bernard Lumbgrew, John W. Shea, John Ingram, Pasco Medo, Pat

Flinn, William Wills, Richard Wills, William Riddle, George Sproule, Thomas Maher, Joe Quire, Jacob E. Tysco, William C. Taylor, Harry Thomas, Antone Ferogelio, J. L. Murray, William Sharrow, Joseph Kroker, Edwin C. Gilee, Owe Lavein, Michael Elliott, Anton Temitti, Adro Pirjatel, Thomas Eld, William Wright, Edwin Williams, Ed. Williams, John Tregear, Dennis Call, Garrett Peiroe, P. F. Keegan, Joseph Carne, Michael T. Kelley, Quinn Crowley, Lawrence Scott, Joseph Ralph, J. W. Harris, Thomas Brogan, Bennett Tregonning, Herman Boyce, Pat Mullin, William Newton, M. Sneller, Malachy Lenihan, Fred C. Hall, H. Dewey, Anthony Ball, C. Bertoglio, E. J. Bertoglio, Pete Wenskas, Dan Fuller, August Erickson, Frank Hundee Barton, Mitchell, John P. McQuirk, Charles E. Sievers, Peter J. [142] Naughton, John Campbell, Andrew Johnston, George Timmings, George Stodden, Quinn Kelly, Frank Nark, Henry Kuly, John Neikklla, Thomas Caddy, Victor V. Mack, Michael McKevitt, John Doran, Thomas A. McLaughtlin, Bono Battirta, John Anda, B. Anda, Antone Gainanis, Charles Sainni, Richard Waters, John Otterman, Eugene Murphy, Angus McLeod, Thomas Windon, W. H. Dunston, R. W. McDonald, Frank Carroll, David Small, Rod McCaskill, Con McGee, J. C. A. Underwood, Martin Murrish, Mat Filhy, A. Tilbag, John H. Mutton, William Roberts, Robert Thompson, Harry Storms, Peter Osterman, Patrick Walsh, Dan Downey, William Hodge, Anthony Allemandi, Eigha Bowden, William Tregonning, Francis J. Roberts, Joh Alva, John N. Smith,



John Oldes, William Hall, Frank Bayok, Henery Karpi, Edward Richards, Harry Pope, James Trevithick, Donal Moore, Richard Williams, Charles H. Johnston, Dan Brogan, Martin Konade, James Leggo, R. Pierce, George Glenn, Joe Hagan, Elijah Fall, William Hallesey, Con P. Harrington, Frank J. Gleen, J. F. Nagle, Frank Cusing, C. W. Chlenker, H. J. Curley, John C. Sullivan, Dan J. Murphy, Dan Simmik, James Caritto, Con Currain, James F. Kelly, Pat Ragan, J. L. Neenan, J. T. Jacobs, John Waters, H. J. Klaning, A. Elkins, E. Beckwith, Gus Lein, Alfred Cocking, John Fleming, John Jourdan, F. J. Keegan, John A. Smith, William H. Perry, W. S. Barclay, Thomas Leahy, Con C. Murphy, Fred C. Gill, Dan D. Doyle, John Mesoch, William L. Siles, John S. McLaughlin, Clyde H. Otis, Barney Leon-esio, Fred McDonald, Mike Geary, Moses Forgett, T. Camayo, Thomas Duheme, Henry Haterell, Richard Harney, W. Roberts, Gwan Mackey, Charles Clantus, P. H. Carney, Charles Terry, George Lewis, Peter McGeehan, Pat K. Shea, T. D. McIlroy, Michael Shea, Patrick Call, Mike Rogers, Con L. Sullivan, Jacob Sonk, Herman Crunsberg, George Parlan, Henry Dingles, John Fontana, Charles Keam, John Thomas, John Duffey, James Greenway, James G. Sullivan, William John Praed, Abraham Alorott, ~~John Winden, W. H. Dunston, R. W. McDonald, Frank Carroll,~~ [143] John Doyle, William Trw-hella, Anglo Moroni, W. M. Lightfoot, Phil C. Mur-phy, John H. Thomas, C. W. Peacock, Frank Um-geser, Thomas McElroy, W. J. Richards, Bennet Moyle, Andrew Masmpa, Frank McGuire, Mike



Orso, John Morello, Robert Lassen, W. Palmer, Strin Frank Hubbard, James E. Richards, M. J. Marrenan, John Long, James Trebilcock, Nerbin Johns, Sam T. Banfield, Tim Sheehan, Samuel Rich, R. J. Tonin, Dan Boynan, James Bennetts, Pat Reilly, Fred J. Prout, Mat Jacobsin, Thomas Kelly, John Noyle, Jessey W. Jones, James Kemp, Andrew Osborn, James Eslick, John C. Sullivan, C. Hill, J. W. Comford, Charles Rochon, Chric Vivian, James H. Williams, William Snyder, Nelson Jaspersen, Peter Bottio, William Brew, Nathan Brew, Charles Consoni, William Kirk, J. D. Murphy, George Burke, Arthur M. Ellvana, Frank McKeegan, M. C. Lupey, Mike Sheehan, John Kekky, Dan W. Shea, B. Ciloti, Alfred Floyd, Symon Daly, Richard Kiley, John Toward, Thomas Quinlan, James C. Lowney, *Henry*, Henry Perkins, John J. Thomas, John Jory, W. J. Floyd, Pat Gibbons, George Roche, Andrew Nolan, Mike Lowney, James G. Barkla, John J. Conolly, John Finnegan, Dennis Sullivan, Jerry J. Sullivan, P. F. Sweeney, Pat Fahey, J. J. Murphy, William Rodda, Thomas Smith, Daniel Bacca, Ike Ritson, D. Perrier, John Peterson, Pat McVarry, James H. Johns, William Johns, James Wall, Alex March, John L. Matson, Humphrey Courtney, Dan Leahy, Mike Coll, D. L. Powers, Dan Dolan, John Sonbo, Pat King, E. M. Walter, Thomas Treloar, Jnr., Relix Neff, Naich Gidvando, Pat Minston, D. Vicasovich, Mike Fluiter, Charles Moroni, Mike Leahy, W. D. Williams, Joseph Pearce, John J. Roche, Antone Zuovo, Mike Kangas, George Peyiovich, Pat McLea, James

Kempsey, E. J. Hawton, John Cinningham, Andrew Hamberg, Pat Hennessy, Joe Lamul, Mike O'Neill, James Hyde, Pat Sullivan, Frank Reilly, Andrew Matson, Yakab Yanson, J. A. Brennan, Henery Jakela, Chas. H. Phoff, Paul Toomey, Samuel Rodgers, Lewis Hopkins, George McGan, Acker Corner, James Guest, John Haskins, John Sullivan, [144] William Moran, E. J. Clemo, Archie McDonald, Sam Woodward, Matt Vertoglio, W. H. Williams, Joseph Kusna, Pat McGuire, Joe Pgnett, A. R. Mordin, Tim Hanley, Pete Callahan, John Shea, Conrad Hall, Charles Mullec, Matt Whalen, Thomas Sadlier, Jerry M. Sullivan, T. J. Murphy, Mike O'Neill, Joseph Pearce, Nicholas Pearve, James Flynn, Martin Byrne, William Callow, James Hughes, Joe Butte, William Brew, James Harrington, Frank McMannon, Tim Callahan, Mike Dwer, William M. Casey, Thomas Brennon, Peter Negretti, Pat O'Neill, T. F. Keating, Henry L. Fluke, William Lester, William Hanifan, Fred Webber, P. F. Burns, George Burns, Timothy Lowney, Albert Brown, James R. Sloan, James H. Bennetts, A. C. Dawe, Pat O'Neill, James Hern, D. E. Murphy, John Bowen, Thomas Pusse, John Kewle, Mike Horvilke, James P. Farrell, Ben Cameron, Deny Murphy, Jerry D. Murphy, Edward Buzza, Dominic Renaldo, Batt Beanco, Hugh Waters, John L. Donohue, Stephen Thomas, Thomas Connors, Terrance Reilly, Pat Browse, Charles Halley, Martin Kanuch, Thomas F. Ryan, James P. Lowney, Tim Shea, James Flanda, Lui Psenda, Radislan Sakolich, Thomas Rowe, John A. Shanan, Pat Cummings,

Pat J. McKeaney, James Connell, Pat O'Brien, Sam Marrtelia, John T. O'Leary, Jacob Farce, Mike Higgins, Jerry Driscoll, Emerson Glasgan, Jacob Hore, James W. Shea, Con Shea, John Barrett, Maurice Dennehy, J. H. Hewitt, Pat Lowney, Pat T. Murphy, James H. Shea, George Selfridge, Henry Blewett, Ole Persons, Joseph M. Smith, John Houaban, Nick Botorick, William Higgins, Nich Lebatio, Steve Cearne, William Zeck, M. Gerson, Matt Sheller, ~~John Houaban, Nick Botorick, William~~ John Moroni, Mike Keeley, Walter Potela, James Nevins, John Walsh, Earnest Rogert, R. E. Hartley, Richard Jaat, Arthur Boyle, E. Boyle, Jerry O'Neill, Earnest Silvester, John Donohoe, W. J. Kenney, Thomas H. O'Connell, Pat Leonard, Ulivo Stevani, Angelo [145] Mattucci, Fred Stoner, William Fouyer, John Fouyer, Ben Ham, Connor Chambers, George D. Hexalett, Gerald B. Knott, William McGinnis, James O'Neill, Mike Lyons, John Malloy, Frank Vevian, Patrick Fleming, John Ferns, Richard Ferns, James McGure, Pat Gannon, Pat Hartington, Jerry Sullivan, Dennis Lynch, Charles McLoghlin, J. H. Mulane, James O'Conner, J. C. Scannell, Charles Dolan, Samuel Eddy, H. Brr, A. Buckley, E. T. Kelley, Mike Kearns, John B. Toomey, Pat Quinn, James Sullivan, George O'Brien, Thomas Powers, Ed. Sweeney, Winfered Russell, John M. Cumba, Mike Sullivan, Dennis Holland, Jerry D. Harrington, James Berne, James McGuire, Mike Casey, Jerry F. Sullivan, T. B. Williams, John H. Trevitheck, Thomas Tallon, James H. Williams, Pat Leary, Martin Cates, Benjamin



Berling, Pat Cavanaugh, D. J. Harrington, Pat Murphy, William Tobin, Batt O'Neill, John T. Daley, Dave D. Plackie, John A. Ryan, John McGenley, Louis Duclelso, Antone Jerry, Patrick O'Neill, Joe Sinkovic, M. C. Harrington, J. C. Donnelly, Con T. Harrington, Tim Leary, Joseph Para, Mike Meyack, James Tredinnick, Joseph Mitchell, Pat A. Smith, James Kneebone, Richard Whalen, Edward Dunn, Con Sullivan, Dennis C. Sullivan, P. J. Burns, Thomas A. Collins, Frank Actis, J. L. Roess, John R. Walsh, P. S. Dillon, Henry Cox, John P. Loughlin, John W. Newell, Jacob C. Weidenbach, Michael Hennigan, Dominic Davetti, John Keyes, John M. Murphy, Pat Connelly, George Honeychurch, John Rogers, Con O'Neill, Charles McDomertt, H. C. Howell, William Flynn, John Whalen, Moses Nolan, Charles Boyd, M. C. Murphy, John Byesfeld, William Hates, Joseph Burke, Henry Thomas, Dennis O'Donnell, Alex. D. Morrison, Thomas Lannon, Patrick O'Farell, James Gibbons, Jerry Crowley, W. Matthews, Jerry Harrington, Dan L. Reynolds, Matt Old, James Sullivan, Charles Masters, Antone Chadest, William McNamara, Thomas Higgins, James Thomas, Peter Byrne, John Vrkurke, [146] Pat McCaughey, John Copley, John Keegan, J. P. Ready, Dan F. Harrington, Costante Pellegrini, Bat Murphy, George M. Tyrell, John Hampton, E. Whalen, P. H. Daly, Richard Gladney, M. S. Cannan, Pat S. Greene, Michael Collins, David Powers, William Johns, John J. Murphy, Ed Fleming, Phillip McGovern, George W. Foley, Dan Callahan, Dan Sulli-



van, Mike Harrison, Mike Gorman, M. W. Sullivan, M. H. Cochrane, Thomas A. Kelly, George Ford, Steven McGeil, Mike Goodwin, Edward Jones, Harry Richard, John Hamilton, Joseph Sandow, Phillip Rowe, Henry Hendrickson, James Hennessy, John Mullins, T. W. Tucker, Andrew George, Frank Rogers, James Sullivan, Dennis Sullivan, Paul Trethaway, Stephen Carkesh, Frank Becker, Ed. Postern, R. Moran, James Ryan, James Williams, Thomas Williams, Charles Thomas, C. Gallagher, John Merford, Thomas Wolegan, Miles Gibbons, Patrick Nuhent, Pat Mullen, Pat McNulty, John Holden, John P. Plker, Harry R. Stevens, Charles Croene, Pat J. Harrington, Patrick J. Murphy, John O'Connell.

John W. Hughes, Tim B. Sullivan, Pat Clark, James Kemp, Mike Hannian, Jerry O'Leary, Nicholas Otes, Charles Bellamy, Hugh Black, John Jacobson, Matt Jacobson, Lewis Johnson, James Kenkin, J. H. Jenkin, J. J. Galvin, John Gill, Perley J. Burns, John Stevens, Jacob Dollar, Patrick Kennedy, Gorge Marlin, William Eddy, Thomas J. Shoupes, Edward Thomas, Herman Baumgart, Anson Schrelinse, James W. Whitford, M. J. Sullivan, Richard Sullivan, Jerry McCarthy, S. A. Caygill, Thomas F. Rowe, Joseph Dillon, James Pursell, Paul Rewsoh, James Hy Hosking, W. J. Warren, James Egan, Pat Ambrose, John Ferlick, Dennis O'Brien, Thomas Rafferty, Em Badulovich, Michael O'Neill, James Cacking, George Tuckett, J. C. Williams, Richard Hancock, Lawrence Groulx, William Scandling, Oscar Jackson, John Simson,

Charles Johnson, M. J. Harrington, William Eva, Ed King, John J. Murphy, W. J. Richards, Griffity D. Thomas, Fred Southcombe, John McKenna, Mike McGovern, Pat Cronin, W. E. Littor, Andrew E. Johnson, Antone Castagur, John A. Byrne, C. W. Price, Pat C. Lowney, Maurice Stack, John Donaghy, William J. Bray, James Frill, R. J. Cooper, Pat McGonigle, [147] T. J. O'Neill, Tim D. Murphy, Reddy H. Welsh, Tim J. Harrington, Pat Harrington, James E. Lowney, Frank Escallier, P. S. Smith, Owen N. Caw, Henry Takson, Henrick Johnson, P. E. Delaney, A. D. McDonald, J. J. McDonald, John Donovan, Thomas Hurley, Aldred Matson, Joe Spedey, John J. Lowney, John D. Shea, Pat Rock, G. H. Giles, John Catella, Dan Purphy, Batteta Orri-gani, Michael Leonard, John Holland, Ed. Houley, Harry Egan, Dennis Harrington, Patrick Cloonan, William E. Sears, Michael Toohey, James Donahue, John Sullivan, Con P. Sullivan, Pat K. Kennedy, Dan Lynch, Charles Brown, Ed. Wilkenson, William Murrish, Mike J. Shea, Jerry D. Sullivan, Dennis R. Sullivan, Pat Simon, Mike Learly, George Brozovich, James O'Donnell, Frank E. Hand, Jas. Juvan, Frank Raux, Dan Driscoll, J. C. Dvanny, Antone Rousal, John Trent, Matt Ravici, Gl. Manichucci, Thomas Jewel, Gus Nelson, Angelo Pera, Frank Ayers, Gus Petrich, Oscar Johnson, Percy Smith, Tim McCarthy, Frank Bell, William Crowley, James Numanly, John J. Dwyer, James Stapleton, Richard Johns, Steph Couch, John P. Holden, S. Tippitt, James Lehy, Con McLoughlan, Thomas H. Holman, Matt Niema, Mike Brannan, John Ardinsome, John

Bradley, Jerry W. Sullivan, T. E. Finnegan, Phillip Luata, Joseph Mellican, Fred Walters, Henry McDermott, John P. Harrington, Joseph Turk, Joe Ritson, J. B. Ritson, Ed J. Lowney, Thomas Meaney, Martin Boyan, J. P. McGowan, William Wall, Ed. F. Sullivan, Alex J. McDonald, Mike McCarty, J. F. Olsen, Pat Cotter, Mike Cotter, Ed Menhennet, Darby Hastings, John Stecham, W. Y. Nicholas, W. B. Richards, Alfred Trescottich, William Erickson, James M. Callion, John G. Hanock, A. J. Crone, Edwin Attield, Anthony Sharkey, Wm. Muldare, John Guy, Martin Kennedy, Pat J. Brennan, Maurice Lowney, Jerry C. Murphy, John Walley, Has Eggurm, Mike Matson, Elias Maky, R. D. Angove, Richard Skerer, George Peoplas, Pat Buckley, Frank Hart, Samuel Treloar, Alex McMahan, Mike Carrig, Owen O'Conner, Peter Mandich, Mike Ryan, William J. Bryany, Gordon English, Mike John Holm, John Tramer, Matt Mehar, Maurice Hurley, Joe Merrick, Nels Gravelle, Tom O'Marra, Owen Twohey, [148] John Neisi, John Darragh, Peter Bergman, Radan A. E. Rollin, Tom Hennessy, Stephen Thomas, Eugene Terrell, Fred Richards, J. Y. Argemedede, Anton Tinetti, John Tippet, Paul Schultz, John McGrath, E. Parini, Miles Ferrich, Thomas Hilling, William Hocking, George G. Marshall, James Leon, Barney Leary, Miles Lyons, Richard R. Jones, John Trevolsock, Nick Hermo-nach, Gust Tuline, Bat Shea, D. Olnstead, John Williams, Jerry B. Harrington, Ben Moran, Albert Traise, Eugen Murphy, Henry Scanlon, Phil Garity, John Silovitch, Tim J. O'Leary, Heny Terna,



Michael Keeshen, J. J. Willcox, Boutal, Henry P. Sullivan, Joe McDonough, John P. Hanely, Dennis Ryan, Oswald Barry, D. D. Evans, Steve Lee, C. Charles Wellman, William Grant, John Slavin, A. Guelfi, John Barei, James Johnston, Thomas Meekoyoh, Mike D. Sheehan, Thomas Gilroy, Mike McGisern, William Pollard, James Marron, John Dillon, Alfred Willoughby, Thomas F. Gleson, Thomas Bullock, Barney Gaffney, Thomas H. Barker, Nick Tepich, John P. Yelish, Nicholes Byrne, George M. Clark, John L. Loughlin, Steward Workman, Dan Driscoll, J. H. Dreyfus, Pat D. Shea, C. V. Olsen, J. W. Jacobson, G. H. Kent, J. W. Swift, James Hart, Lewis B. Ebeder, Antone Curatto, George Ferguson, Dan Carroll, Joseph Balkovotz, Alfred Rogers, Dennis P. Sheehan, Peter B. Ralpj, Pat O'Neill, Paul E. Hoffman, Charles E. Grund, John A. Curran, Ed Lamerton, James D. Reill, Mur Pasala, Jacob Soda, William Conningham, Mike Ryan, W. B. Gnos, A. McGuire, Mike Conway, Thomas A. Fitzgerald, John Chim, Jerry P. Murphy, Peter McDermott, Peter Marron, James Shea, Antonini Guisi, John Herron, James Gillmore, H. A. Fitzpatrick, Mike McMahon, James M. Gleason, James P. Gleason, Charles R. Connolly, Arthur Sampson, Alfonsus Henneberry, Phillip Gunn, James Ryan, Michael Leary, Peter Leary, Peter Tobin, James McDermott, H. E. McManus, D. H. Kehoe. [149]

In the matter of the Extension of the corporate existence of "The Miners' Union" a corporation, existing, by and with the consent in writing of two-thirds of its members, first had,



State of Montana,  
County of Silver Bow,—ss.

We, the undersigned, W. H. Eddy, President of "The Miners' Union," Frank O'Connor, Secretary of "The Miners' Union, and W. H. LaDuke, J. J. Quinn, F. W. McKeon, Charles O'Brien, and John Shea, Trustees of "The Miners' Union," do hereby certify, That "The Miners' Union" is a corporation existing under and by virtue of the laws of the Territory of Montana. That articles of incorporation of "The Miners' Union" was filed in the office of the County Clerk of Silver Bow, Territory of Montana, on the 4th day of May, 1881, and that the said corporation is now in full force and effect and existence.

That a majority of all the members of "The Miners' Union" have given their consent in writing, and elected to continue the corporation of said Union, and consented in writing, and elected to continue the corporate existence of "The Miners' Union," under and by virtue of the provisions of the Civil Code of the State of Montana, applicable thereto, as provided for by Section 400 of the Civil Code of the said State of Montana, That such consent and election and the proceedings had thereon has been filed in the office of the County Clerk and Recorder of the County of Silver Bow, State of Montana, duly certified to by the President, Secretary and Trustees of "The Miners' Union" and a copy thereof filed in the office of the Secretary of State of Montana, certified to by the County Clerk and Re-

corder of the County of Silver Bow, State of Montana,

We, Further certify, That two-thirds of all the members of "The Miners' Union" have assented in writing, and authorized and instructed the President, Secretary and Trustees, to extend the corporate [150] existence of "The Miners' Union," for a period of Twenty Years from the 4th day of May, 1901, that being the date on which its corporate existence will expire,

And we, further certify, that two-thirds of all the members of "The Miners' Union" have given their consent in writing, to extend the corporate existence of "The Miners' Union" for a period of twenty years from and after the expiration of its corporate existence, and from and after the 4th day of May, A. D. 1901,

That, the above and foregoing transcript is a full and true and correct transcript and copy of the proceedings had for the purpose of extending the corporate existence of "The Miners' Union" and consists of eighteen pages, That two-thirds of all the members of "The Miners' Union" signed their names thereto and gave their consent in writing to extend the corporate existence of "The Miners' Union" for a period of twenty years from the 4th day of May, A. D. 1901.

That the originals of such consent in writing is now on file in the office of "The Miners' Union."

In witness whereof, We have hereunto set our hands and seals and caused to be affixed hereunto the

corporate seal of "The Miners' Union" this 8th day of February, A. D. 1901.

W. H. EDDY, (Seal)

President of "The Miners' Union."

FRANK O'CONNOR, (Seal)

Secretary of "The Miners' Union."

W. H. Le DUKE, (Seal)

JOHN J. QUINN, (Seal)

[Corporate

Seal]

F. W. McKEON, (Seal)

JOHN SHEA, (Seal)

CHARLES O'BRIEN, (Seal)

Trustees of "The Miners' Union." [151]

### EXHIBIT III.

At a regular meeting of The Miners' Union, of Butte, Montana, held at the headquarters of said Union at 217 N. Main, Butte, Montana, on Tuesday, the 11th day of August, 1914, the following resolution was introduced by Mr. Pat Lee:

WHEREAS, The Butte Miners' Union was organized on the 13th day of June, 1878, under the name of Butte Miners' Union, and

WHEREAS, The same was duly incorporated on the 4th day of May, 1881, under the name of "The Miners' Union," the word "Butte" having been inadvertently left out; and

WHEREAS, for a period of 36 years the said Union has been generally known and designated as "The Butte Miners' Union," and;

WHEREAS, a number of actions were instituted and prosecuted in behalf of said Union under the name of "The Butte Miners' Union," and

WHEREAS, the mistake in the incorporating of the said Union was not discovered until very recently; and,

WHEREAS, it is necessary for the protection of this Union and the interests of its members, that the corporate name be amended to read "The Butte Miners' Union," the better to protect out interests;

Therefore, BE IT RESOLVED, that The Butte Miners' Union, incorporated as aforesaid under the name of "The Miners' Union" in regular meeting assembled, hereby authorize, instruct and direct our Trustee to immediately take such steps as are necessary to amend the articles of incorporation by inserting the word "Butte" after the word "The" in the articles of incorporation, so that the same will read, "The Butte Miners' Union."

Whereupon, upon motion of the said Mr. James Ryan, seconded by Mr. Walter Little, the said resolution was put to a vote of the meeting and duly carried, and so declared by the Chair.

We, the undersigned, being respectively the President and Secretary of The Miners' Union of Butte, Montana, generally known as [152] The Butte Miners' Union, DO HEREBY CERTIFY; That the above is a full, true and correct copy of a resolution duly introduced and passed at a regular meeting of the said union, held at the headquarters of said Union on Tuesday, the 11th day of August, A. D. 1914, at Butte, Montana.

FRANK O'CONNOR,  
President.

[Corporate Seal]

Attest: PAT O'NEILL, Secretary.



At a special meeting of the Board of Trustees of "The Miners' Union," of Butte, Montana, generally known at "The Butte Miners' Union," duly called, held at the headquarters of the Union, on Tuesday, the 11th day of August, 1914, at which said meeting there were present the following Trustees: M. A. Sullivan, Frank Martin, James Walsh, James Ryan, constituting a majority of the Board of Trustees of said Union, there was presented to the meeting by Mr. ————— the following resolution, heretofore, on this day, passed by the members of said Union at a regular meeting thereof, to wit:

"WHEREAS, The Butte Miners' Union was organized on the 13th day of June, 1878, under the name of Butte Miners' Union; and,

"WHEREAS, the same was duly incorporated on the 4th day of May, 1881, under the name of "The Miners' Union," the word "Butte" having been inadvertently left out, and

"WHEREAS, for a period of 36 years the said Union has been generally known and designated as "The Butte Miners' Union," and,

"WHEREAS, a number of actions were instituted and prosecuted in behalf of said Union, under the name of "The Butte Miners' Union," and, [153]

"WHEREAS, the mistake in the incorporating of the said Union was not discovered until very recently, and,

"WHEREAS, it is necessary for the protection of this Union and the interests of its members, that the corporate name be amended to read "The Butte Miners' Union," the better to protect our interests;

THEREFORE, BE IT RESOLVED, that The Butte Miners' Union, incorporated as aforesaid under the name of "The Miners' Union," in regular meeting assembled, hereby authorize, instruct and direct our Trustees to immediately take such steps as are necessary to amend the articles of incorporation by inserting the word "Butte" after the word "The" in the articles of incorporation, so that the same will read, "The Butte Miners' Union."

Whereupon, Mr. Frank Martin introduced the following resolution:

"Whereas, It has been brought to the attention of the Butte Miners' Union and the Trustees thereof, that for the reasons set forth in the resolution of the members of said Union, this day passed, and set out in the minutes of this meeting, it is desirable and necessary to change the name of said Union from "The Miners' Union," to "The Butte Miners' Union";

THEREFORE, BE IT RESOLVED, that the name of said Union be and the same is hereby changed so as to read, "The Butte Miners' Union," instead of "The Miners' Union"; and

BE IT FURTHER RESOLVED that a certified copy of these proceedings be immediately filed with the Secretary of State of the State of Montana, and a certified copy thereof filed with the Clerk and Recorder of Silver Bow County, State of Montana, in accordance with the provisions of Section 3912 of the Revised Codes of Montana, as amended by the Eleventh Session, Laws of Montana, page 135." [154]

Upon motion of Mr. James Ryan, seconded by Mr.

James Walsh, the said resolution was put to a vote of the meeting and unanimously carried, and so declared by the Chair.

We, the undersigned, constituting the Board of Trustees of "The Miners' Union," HEREBY CERTIFY:

That the above and foregoing is a full, true and correct copy of the minutes of a special meeting of the Board of Trustees of said Union, held at the headquarters of said Union, in the City of Butte, County of Silver Bow, State of Montana, on Tuesday, August 8th, 1914.

M. A. SULLIVAN,

Char.

[Corporate Seal] Attest: JAMES WALSH,

Secretary.

FRANK MARTIN,

JAMES RYAN,

Constituting the Board of Trustees of "The Miners' Union," generally known as "The Butte Miners' Union." [155]

## EXHIBIT IV.

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a  
Voluntary Organization, Association of Per-  
sons, With Its Headquarters in the City and  
County of Denver, State of Colorado, and  
CHARLES H. MOYER, President of the  
Western Federation of Miners, a Voluntary  
Organization and Association of Persons  
With Its Headquarters in the City and  
County of Denver, and State of Colorado;  
GUY E. MILLER and ED. O'BYRNE,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PAT-  
RICK O'NEILL, MIKE A. SULLIVAN,  
JAMES RYAN, JAMES WALSH and  
PATRICK QUIGLEY,  
Defendants.

**Amended Complaint.**

Plaintiffs complain of defendants, leave of Court  
being had and obtained to file this amended com-  
plaint and for cause of action allege:

I. That the Western Federation of Miners is a  
voluntary organization of persons engaged in the  
mining, milling and reduction of ores and minerals,  
and about the mining, milling and reduction of ores  
and minerals, with its headquarters in the City and



County of Denver, in the State of Colorado; and that Charles H. Moyer is the duly elected, qualified and acting President of said Western Federation of Miners; and that said Western Federation of Miners is made up of different local unions, or organizations, in different states and territories in the United States of America, the members of which local unions are members of the Western Federation of Miners; and that the said Western Federation of Miners issues to the different local unions which are parts of the Western Federation of Miners, a charter for the regulation and conduct of said different local union, and has a constitution and by-laws therefor. [156]

II. That The Butte Miners' Union is a corporation existing under and by virtue of the laws of the State of Montana, the membership of which corporation is composed of persons engaged in mining, milling, smelting and handling of ores and minerals, and that the members of said Butte Miners' Union, a corporation, are members of the Western Federation of Miners; and that on the 22d day of September, A. D. 1914, The Butte Miners' Union, a corporation as aforesaid, and the members thereof, by and through its said members and officers, petitioned the said Western Federation of Miners, a voluntary association and organization as aforesaid, for the issuance to said Butte Miners' Union of a charter, a copy of which petition is hereunto annexed, marked exhibit "A," and made a part of this complaint; that thereafter, on the 3d day of October, 1914, under and by virtue of the Constitution and By-laws of the Western Federation of Miners, a voluntary organiza-

tion and association as aforesaid, Western Federation of Miners, issued to the Butte Miners' Union, a corporation, and its members, a charter, a copy of which said charter is hereunto annexed, marked exhibit "B" and made a part of this complaint, which said charter was accepted by the said Butte Miners' Union, a corporation, and its members.

III. That there is a provision of the Constitution of the Western Federation of Miners for the government of said Western Federation of Miners and the local unions belonging to said Western Federation of Miners and the membership thereof, as follows, to wit:

#### "AMENDMENT

Amend by adding to the 'Duties of President', in Art. 4, Sec. 1, after the word 'Miners,' page 9, line 37:

"The President shall have power on petition of ten per cent of the members in good standing in their respective locals making charges in writing against their local officers to take complete charge of the local's affairs, and if the charges are proven he shall call a special election within 30 days and place [157] local's affairs on a business basis before relinquishing to local's officials."

That The Butte Miners' Union, by and through the vote of its membership, at an election duly and regularly held, adopted the aforesaid provision of the Constitution of the Western Federation of Miners as a part of the rules and regulations, for the government of the Butte Miners' Union, and membership thereof.

IV. That thereafter and on the 23d day of November, A. D. 1914, and in accordance with said provision of said constitution and by-laws hereinbefore set forth, charges in writing, a copy of which said charges is hereunto annexed, marked exhibit "C," and made a part of this complaint were preferred against the officers of the Butte Miners' Union, a corporation, who are the defendants above named, to wit: Martin Scahill, President, Patrick Lee, Secretary Treasurer, Patrick O'Neill, Recording Secretary, Mike A. Sullivan, James Ryan, James Walsh and Patrick Quigley, Trustees, and were presented to Charles H. Moyer, President of the Western Federation of Miners, and Charles H. Moyer, President of the Western Federation of Miners, was petitioned to take complete charge of the affairs of the Butte Miners' Union, a corporation, in accordance with the aforesaid provision of the constitution of the Western Federation of Miners.

IV-A. That the said charges hereinbefore set forth are signed by ten per cent (10%) of the membership of the Butte Miners' Union, a corporation, and that the said charges are based upon the conduct and actions of the defendants, herein named, the said conduct and actions being that the said defendants have wilfully, unlawfully, wrongfully and without warrant of authority, lavishly, improvidently, and without due regard to the rights of the membership of The Butte Miners' Union, a corporation, expended, paid out, and disposed of the money belonging to the Butte Miners' Union, and have failed and neglected and refused to properly account for the



[158] money so expended, and have allowed and permitted persons not members in good standing of The Butte Miners' Union, a corporation, to participate in the meetings of The Butte Miners' Union, a corporation, to vote therein and to have a voice therein in the government and affairs of The Butte Miners' Union, a corporation; that they continually expended the money of The Butte Miners' Union, for unnecessary purposes and have paid out, in this connection, unnecessary and exorbitant salaries to divers and sundry persons without due regard for the welfare and protection of the interests of the membership of The Butte Miners' Union, a corporation; that they have, by their acts, wrongfully, almost completely depleted the sick relief fund of The Butte Miners' Union, a corporation, which fund is for the use and benefit of sick and disabled members of The Butte Miners' Union in good standing and that said defendants still persist in doing the above-mentioned acts and in preventing these plaintiffs and particularly the plaintiff Ed. O'Byrne, and the members of The Butte Miners' Union, a corporation, who signed the charges and petition against said officers, from having the affairs and conduct of The Butte Miners' Union, a corporation, run and conducted in a just and lawful manner in accordance with the by-laws and constitution, for the government thereof.

V. That thereafter, on the 8th day of December, 1914, Guy E. Miller, one of the plaintiffs above named, as the true and lawful attorney in fact of Charles H. Moyer, President of the Western Federation of Miners as aforesaid, holding a power of at-



torney from said Charles H. Moyer, President of the Western Federation of Miners as aforesaid, a copy of which power of attorney is hereunto annexed marked exhibit "D," and made a part of this complaint, at a regular meeting of the members of The Butte Miners' Union, a corporation, presented the said charges and demanded that the aforesaid officers of said union, to wit: Martin Seahill, President; Patrick Lee, Secretary-Treasurer; Patrick O'Neill, Recording Secretary; Mike A. Sullivan, James Ryan, James Walsh, and Patrick Quigley, Trustees; [159] conform to said by-laws and constitution of the Western Federation of Miners, and The Butte Miners' Union, and place in the hands of said Charles H. Moyer, President as aforesaid, pending the determination of the above-mentioned charges and petition and the election of new officers, if said charges shall be found to be true, the affairs and business of said The Butte Miners' Union, a corporation as aforesaid, and the books and property thereof, for the purpose of safe-keeping and preservation, in the interest of said members of the corporation. That notwithstanding the presentation of said charges and petition as aforesaid, and the provisions of the constitution and by-laws, aforesaid, of the said Western Federation of Miners, and of said The Butte Miners' Union, a corporation, the aforesaid defendants have failed, refused and neglected, and have prevented, and are now preventing and threaten to continue to prevent the said Charles H. Moyer, President of the Western Federation of Miners, as aforesaid, from taking charge of, control

of, the affairs and business of The Butte Miners' Union, a corporation, as aforesaid, pending the determination of the said charges and the election of new officers by the members of said The Butte Miners' Union, if the said charges shall be found true; and that the said Martin Seahill, President; Patrick Lee, Secretary-Treasurer; Patrick O'Neill, Recording Secretary; Mike A. Sullivan, James Ryan, James Walsh, and Patrick Quigley, Trustees, continue to use the property of The Butte Miners' Union, a corporation, as aforesaid, to draw its funds and moneys from the banks in which the same has been deposited, and to handle and take charge of the property and money, and prevent and threaten to continue to prevent the said Charles H. Moyer, President of the Western Federation of Miners, and his duly appointed, qualified and acting attorney in fact, from taking possession thereof, in accordance with the hereinbefore set forth charter, constitution and by-laws of said Western Federation of Miners and The Butte Miners' Union, a corporation, all to the irreparable loss [160] and injury of the Western Federation of Miners, a voluntary association, as aforesaid, and the membership of The Butte Miners' Union, a corporation of which Ed. O'Byrne, one of the plaintiffs above named is, and at all times herein mentioned has been, a member in good standing.

VI. That the defendants are without any money or means with which to respond in damages herein and to make good any loss and injury that has occurred, and will occur, through their actions hereinbefore set forth.

VII. That Ed. O'Byrne, one of the plaintiffs herein, is a member of The Butte Miners' Union, a corporation, and one of the persons who signed the charges against the defendants above named, the officers of The Butte Miners Union, a corporation, having paid his dues and assessments thereto, and that he is a member of the Western Federation of Miners, a voluntary association and organization, as aforesaid, and interested in its affairs.

VIII. That Guy E. Miller, one of the plaintiffs herein, is a member of the Western Federation of Miners, and interested in its affairs.

IX. That there is no plain, speedy, or adequate remedy at law whereby the rights of these plaintiffs and of the membership of The Butte Miners' Union, a corporation, and of the Western Federation of Miners', a voluntary organization and association, as aforesaid, can be protected.

WHEREFORE: Plaintiffs pray judgment of this Honorable Court that this Court make its order temporarily restraining the defendants herein, their agents, servants, employees and attorneys, or any one acting for or in their behalf, or under their direction, from in any way interfering with these plaintiffs in the possession and control of the property of The Butte Miners' Union, a corporation, or the prosecution of the business and [161] affairs of The Butte Miners' Union, a corporation; and that this Court fix a day and time certain wherein the defendants herein, and each and all of them, shall be commanded to show cause, if any they have, before this Honorable Court, why they and their agents,



servants and employees and attorneys, and every one acting for and in their behalf, or under their direction and control, should not be permanently restrained and enjoined from in any way interfering with these plaintiffs and the members of the plaintiff organization in the possession and control of the property and affairs of The Butte Miners' Union, a corporation, pending the determination of the charges filed against the officers of said corporation and the holding and conducting of an election by the members of said corporation are found and proven to be true, and from putting the business of The Butte Miners' Union, a corporation, on a business basis.

CANNING & GEAGAN, and  
E. P. KELLY,

Attorneys for Plaintiffs.

State of Montana,  
County of Silver Bow,—ss.

Guy E. Miller and Ed. O'Byrne, being first duly sworn, says: That they are two of the plaintiffs above named; that they have read the complaint, knows the contents thereof, and that the facts, matters and things therein stated are true of their own knowledge.

GUY E. MILLER,  
ED. O'BYRNE.

Subscribed and sworn to before me this 8th day of Feb. A. D., 1915.

[Notarial Seal]

P. E. GEAGAN.

Notary Public for the State of Montana; Residing  
at Butte, Montana.

My commission expires Jan. 13, 1918. [162]



EXHIBIT "A."

To the President of the Western Federation of Miners, Dennam Building, Denver, Colorado.

The Butte Miners' Union, a corporation, organized and existing under and by authority of the laws of the State of Montana, at a regular meeting held at the headquarters of the said corporation, 217 North Main Street, Butte, Montana, on the 22d day of September, 1914, by a majority vote of its membership present at said meeting passed a resolution *direction* and instructing its president, secretary and Board of Directors or Trustees, to apply to the Western Federation of Miners, for a reissuance of a charter to the said corporation to take the place of its first charter recently lost or destroyed, and said resolution empowered and authorized its aforesaid officers to take all necessary steps and *to* all necessary things in order to procure said charter.

Now, therefore we, Frank O'Connor, President, Pat O'Neill, Secretary, and Mike A. Sullivan, James Walsh, James Ryan, Frank Martin, Pat Quigley, constituting the Board of Directors or Trustees of the said corporation, pursuant to the said resolution, and by authority thereof, hereby make application to you for the reissuance of a charter for a local union to be issued to the said corporation, which shall be known as the Butte Miners' Union, No. 1, Western Federation of Miners, which shall take the place of its first charter recently lost or destroyed.

It is hereby agreed in the acceptance of the said charter that the aforesaid corporation shall conform to all of its provisions and that the same are fully

understood, and to the constitution, by-laws, rules and regulations of the Western Federation of Miners.

IN TESTIMONY WHEREOF, the said corporation has caused this application to be signed by its President, Secretary and Board of Directors or Trustees, and its corporate seal to be attached thereto [163] this 22d day of September, 1914.

THE BUTTE MINERS' UNION, a Corporation,

FRANK O'CONNOR,  
President.

PAT O'NEILL,  
Secretary.

M. A. SULLIVAN,  
JAMES WALSH,  
JAS. J. RYAN,  
Board of Directors or Trustees.

### EXHIBIT "B."

### WESTERN FEDERATION OF MINERS' CHARTER.

KNOW ALL MEN BY THESE PRESENTS, That acting under the authority vested in us by the laws of the above-named organization, we, the undersigned, do hereby grant this Charter to Butte Miners' Union, a corporation, to be hereafter known and designated as the BUTTE MINERS' UNION NO. 1, WESTERN FEDERATION OF MINERS,

TO BE HELD BY THEM AND THEIR SUCCESSORS, And the aforesaid Union being properly installed, is hereby authorized and empowered to transact business and initiate into its membership,

any person or persons lawfully proposed and elected in accordance with the constitution, rules and regulations of the Western Federation of Miners. It is hereby agreed in the acceptance of this Charter that the aforesaid union shall conform to the constitution, rules and regulations, and in default thereof, this charter may be revoked and the union suspended from all rights, and benefits, according to the laws of the Western Federation of Miners, and further it is agreed that should the aforesaid union withdraw or be dissolved, suspended, or forfeit this charter, then all property, moneys, books and papers, shall become the property of the Western Federation of Miners. [164]

In consideration of the due and faithful performance of the foregoing stipulations, the Western Federation of Miners do bind themselves to sustain said union in the exercise of all rights, privileges and benefits, as a local union under its protection.

IN WITNESS WHEREOF, We have subscribed our names and affixed *out* Seal of the Western Federation of Miners this Third day of October, 1914.

The Butte Miners' Union, organized June 13, 1878.

Original W. F. M. Charter, dated May 15, 1893.

Chas. H. Moyer,

President.

Earnest Mills,

Secretary-Treasurer.

EXHIBIT "C."

Butte, Mont., Nov. 23d, 1914.

To Chas. H. Moyer, President of the Western Federation of Miners, Denver, Colorado.

We, the undersigned members of Butte Miners'

Union, No. 1, W. F. of M. hereby petition you under the constitution to take full and complete charge of the affairs of this union and submit as our reasons for requesting such action, that the officials and trustees of said union have been and are acting in violation of the constitution of Butte Miners' Union and of the Western Federation of Miners and further that there has been utter inefficiency and disregard of the best interests of the organization and the principles of unionism.

We submit the following: (1) Violation of the constitution by packing the meeting with men in arrears, some of whose names were not on the books of the union, giving them a voice and vote in matters of great importance. (2) Refusal of Secretary-Treasurer aided and abetted by the president to submit books and accounts for examination. (3) Failure of walking delegates to render any report to the union or put forth reasonable efforts to increase the membership of this union. (4) Stamps on members' cards without [165] entry on books of receipt. (6) Willful waste in disbursing of funds, especially the sick relief, the constitutional notice to secretary not being complied with. (7) That indifference to the welfare of the organization is clearly manifested by the failure of various officials and trustees to keep in good standing.

Tim J. Lynch	Ed O'Byrne	J. C. Lowney
A. M. Maletto	Jalmer Koskinen	F. H. Shields
John Pearson	E. G. Huntley	Oskar Karri
Wm. Louma	John Toomey	Dan O'Leary
Mike Harrington	Denniss Murphy	Jacob Oliver
Charles Baxter	W. H. Schauf	Patrick King



## EXHIBIT "D."

## POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS, That, I, Charles H. Moyer, President of the Western Federation of Miners, a voluntary organization with its headquarters in the City and County of Denver, State of Colorado, acting under the authority and power vested in *may* by the constitution of the Western Federation of Miners have made, constituted and appointed, and by these presents do make, constitute and appoint Guy E. Miller, of the City of Butte, State of Montana, my true and lawful attorney, for me and in my name, place and stead, to take complete charge of the affairs including all books and papers, of the Butte Miners' Union, a corporation existing under and by authority of the laws of the State of Montana, whose headquarters are at 217 North Main Street, Butte, Montana, and to receive and file any and all charges that may be made against the local officers of said Union and to transmit the same or a copy thereof, to me, and to collect and receive any and all moneys which shall be due, owing and payable and belonging to the said Butte Miners' Union; and in [166] my name represent before any judge or minister of the law whatsoever, and in any court or courts of judicature, and on my behalf prosecute for any debts, fraud and any manner of claims that the said Butte Miners' Union may have against any person or persons and to answer, and defend all actions or causes whatsoever relating to the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitu-

tion and revocation, hereby ratifying and confirming, and holding valid all that my said attorney shall lawful do or cause to be done by virtue of these presents.

Witness my hand and seal at Denver, Colo., this 7th day of December, A. D. 1914.

CHAS. H. MOYER,

President Western Federation of Miners.

State of Colorado,

City and County of Denver,—ss.

I, Fannie M. Patterson, a Notary Public in and for the City, County and State aforesaid, do hereby certify that Charles H. Moyer, who is personally known to me to be the person whose name is subscribed to the within power of attorney, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 7th day of December, A. D. 1914.

My commission expires May 6th, 1915.

[Notarial Seal] FANNIE M. PATTERSON,

Notary Public.

Service of the foregoing amended complaint acknowledged and copy received this 8th day of February, 1915.

A. C. McDANIEL,

PETER BREEN,

Attorneys for Defendants.

[Endorsed]: Filed Feb. 8, 1915. [167]

EXHIBIT V.

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization, Association of Persons  
With Its Headquarters in the City and County  
of Denver, State of Colorado, and CHARLES  
H. MOYER, President of the Western Federa-  
of Miners, a Voluntary Organization and As-  
sociation of Persons, With Its Headquarters in  
the City and County of Denver, and State  
of Colorado; GUY E. MILLER and ED.  
O'BYRNE,

Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PATRICK  
O'NEILL, MIKE A. SULLIVAN, JAMES  
RYAN, JAMES WALSH and PATRICK  
QUIGLEY,

Defendants.

ANSWER TO AMENDED COMPLAINT.

Comes now the above-named defendants, Martin  
Scahill, Patrick Lee, Patrick O'Neill, Mike A. Sulli-  
van, James Ryan, James Walsh and Patrick Quigley,  
and answering the complaint of plaintiff on file here-  
in, admit, deny and allege as follows, to wit:

1. Deny all the *obligations* contained in para-  
graph 1 of plaintiffs' amended complaint.
2. Admits all the allegations contained in para-

graph 11 of plaintiffs' amended complaint.

3. Answering paragraph III of plaintiffs' amended complaint these defendants deny all the allegations contained in said paragraph III.

4. Deny any knowledge for information thereof sufficient to form a belief as to the allegations set forth in paragraph IV of plaintiffs' amended complaint.

5. Deny all of the allegations contained in paragraph IV-A of plaintiffs' amended complaint.

6. Deny each and all of the allegations contained in paragraph V of plaintiffs' amended complaint, save and except that [168] these answering defendants have, for a long time past, and are still attempting to prevent the said Charles H. Moyer, mentioned in said paragraph, or any other person acting in collusion with him or representing him, from getting possession or control of the moneys or property of The Butte Mners' Union, a Corporation.

7. Deny all the allegations contained in paragraph VI of plaintiffs' amended complaint.

8. Admits that the plaintiff Ed. O'Bryne is a member of The Butte Miners' Union, a corporation, as set forth in paragraph VII of plaintiffs' amended complaint, but save as is herein admitted, these answering defendants deny any knowledge or information thereof sufficient to form a belief as to all other allegations set forth in said paragraph VII of plaintiffs' amended complaint.

9. Deny all the allegations contained in paragraph VIII of plaintiffs' amended complaint.

10. Deny all the allegations contained in para-



graph XI of plaintiffs' amended complaint.

11. Save as is herein specifically admitted or denied these answering defendants deny each and every allegation contained in plaintiffs' amended complaint.

WHEREFORE, having fully answered, these answering defendants, pray that the said plaintiffs take nothing by this action and that they be given their costs herein expended.

Further answering and as an affirmative defense to the amended complaint of plaintiff, these answering defendants allege:

1. That they are now and have been during all of these times herein mentioned in plaintiffs' amended complaint, members in good standing of the Butte Miners' Union, a corporation.

2. That the said The Butte Miners' Union, now is and has been during all of the times herein mentioned in plaintiffs amended complaint, and ever since the 4th day of May, 1881, a corporation, duly organized and existing under and by virtue of the laws of the State of Montana, with its place of business in the City of [169] Butte, County of Silver Bow, State of Montana.

3. That the defendant Martin Scahill is now and has been during all of the times herein mentioned in plaintiffs' amended complaint, the duly elected, qualified and acting president of The Butte Miners' Union, a corporation; that the defendant, Patrick Lee, during all of the times herein mentioned in plaintiffs' amended complaint has been, and now is the duly elected, qualified and acting secretary-treasurer of The Butte Miners' Union, a corporation;

that the defendant Patrick O'Neill is now and has been during all of the times herein mentioned, the duly elected, qualified and acting recording secretary of The Butte Miners' Union, a corporation; that the defendant Mike A. Sullivan is now, as has been during all of the times herein mentioned in the amended complaint of plaintiff, the duly elected, qualified and acting chairman of the Board of Trustees of the Butte Miners' Union, a corporation; that the defendant Patrick Quigley, is now and has been during all of the times herein mentioned, a duly elected, qualified and acting member of the Board of Trustees of The Butte Miners' Union, a corporation; that the defendants James Ryan and James Walsh were, at the commencement of this action, duly elected, qualified and acting members of the Board of Trustees of The Butte Miners' Union, a corporation.

4. That the above-named plaintiff, Western Federation of Miners, an alleged voluntary, organization association of persons, with its headquarters in the City and County of Denver, State of Colorado, was at one time, a *bona fide* labor organization composed of various local unions or organizations in different states and territories in the United States of America, also in Canada.

5. That on or about the — day of May, 1893, The Butte Miners' Union, a corporation, applied for a charter in said Western Federation of Miners and that thereafter, on or about the 15th day of May, 1893, a charter was duly issued to The Butte Miners' Union, a corporation, as aforesaid. [170]

6. That thereafter, on the 13th day of June, 1914, the charter issued by the Western Federation of Miners to The Butte Miners' Union, a corporation, was destroyed and that thereafter, on or about the 22d day of September, 1914, the said The Butte Miners' Union, a corporation, applied to the plaintiff, Western Federation of Miners for a duplicate of said charter, which was duly issued to the said The Butte Miners' Union, a corporation, on or about the 3d day of October, 1914.

7. That between the 15th day of May, 1893, the date of issuance of the first charter and the 1st day of December, 1914, The Butte Miners' Union, a corporation, as aforesaid has paid to the plaintiff Western Federation of Miners, as per capita tax, assessments levied and donations appealed for, a sum in excess of One Million (\$1,000,000) Dollars.

8. That the said The Butte Miners' Union, a corporation, between the 1st day of July, 1913, and the first day of July, 1914, paid as assessments to the plaintiff Western Federation of Miners, One Hundred Thirty-eight Thousand Eight Hundred and Twenty-five and 60/100 (\$138,825.60) Dollars, donations, Twenty-one Hundred (\$2100) Dollars, per capita, Seventeen Thousand Five Hundred (\$17,500) Dollars, supplies, Five Hundred (\$500) Dollars, amounting to the total sum of One Hundred Fifty-eight Thousand Nine Hundred and Twenty-five and 60/100 (\$158,925.60) Dollars.

9. That between January 5, 1914, and June 15th, of said year, in dues, assessments and donations, the said plaintiff Western Federation of Miners, received

the following sums of money from The Butte Miners' Union:

January	5.....	\$ 2,000.00
"	19.....	10,000.00
"	22.....	10,000.00
February	4.....	5,000.00
"	5.....	1,250.00
"	16.....	10,000.00
"	23.....	1,250.00
"	23.....	100.00
March	6.....	8,000.00
"	23.....	10,000.00
"	23.....	1,250.00

[171]

April	16.....	\$ 6,000.00
"	16.....	450.00
"	23.....	8,000.00
May	20.....	1,000.00
June	4.....	1,250.00
"	15.....	3,000.00

making a total of Seventy-eight Thousand Five Hundred and Fifty (\$78,550) Dollars.

10. That upon January 1, 1914, the plaintiff, Western Federation of Miners claimed that The Butte Miners' Union, a corporation, owed it a balance of Forty-four Thousand Two Hundred and Sixty-eight and 15/100 (\$44,268.15) Dollars, and from said date January 1, 1914, to June 2d of said year, the following additional amounts:

January	1.....	\$44,268.15
"	16.....	1,250.00
"	21.....	55.00



February	1.....	15,428.00
“	5.....	1,250.00
“	10.....	166.50
March	1.....	20,317.50
“	2.....	1,250.00
“	2.....	7.50
“	18.....	1,250.00
April	1.....	20,639.50
“	10.....	1,250.00
May	1.....	19,656.00
“	7.....	1,250.00
June	1.....	7,576.00
“	2.....	1,250.00

making a total amount owing from January 1, 1914, to June 2d, 1914, One Hundred Thirty-six Thousand Eight Hundred and Sixty-four and 65/100 (\$136,864.65) Dollars.

11. After receiving the said sum of Seventy-eight Thousand Five Hundred and Fifty (\$78,550) Dollars, in a period of six months, the said plaintiff, Western Federation of Miners, claim that at said time, to wit, June 13, 1914, there was due and owing from The Butte Miners' Union, a corporation, to the plaintiff, Western Federation of Miners, a balance of Sixty Thousand Four Hundred and Fifteen and 65/100 (\$60,415.65) Dollars.

12. These defendants further allege that during all of the times in which the said plaintiff, Western Federation of Miners, [172] demanded and received the said sums of money above set forth, from The Butte Miners' Union, a corporation, the said corporation was compelled to pay the said sums of

money to the said plaintiff through its officers and were not permitted to, at any time, send the money themselves, to the places wherein the said officers of the said plaintiff claimed it was wanted for and was to be sent.

13. These answering defendants further allege that through all of the years in which the said The Butte Miners' Union, a corporation, has worked under a charter from the said plaintiff, Western Federation of Miners, that it has not received one cent of benefit in any shape, manner or form from the said plaintiff, Western Federation of Miners.

14. These answering defendants further allege, that one or about the 15th day of May, 1893, the said The Butte Miners' Union, a corporation, had thousands of members and thousand of dollars in its treasury. That all of its members were working in harmony and that they enjoyed the respect, confidence and good will of all of the employers of miners in the County of Silver Bow, State of Montana, and its union cards were recognized and respected by all of them.

15. That because of the tyranny and many exactions of the said plaintiff, Western Federation of Miners, and the manner in which the money of The Butte Miners' Union, a Corporation, had been taken by the said plaintiff, The Western Federation of Miners, without any return to The Butte Miners' Union, a corporation, dissatisfaction was created among its members and the citizens of Silver Bow County to such an extent that they revolted on the 13th day of June, 1914, and later on the 23d day of

said month, with the plaintiff, Charles H. Moyer, came to Butte to run the business of The Butte Miners' Union, a Corporation, assisted by many others, they again revolted, destroyed a large amount of property of The Butte Miners' Union, a Corporation, and attempted to capture and hang the said plaintiff, Charles H. Moyer. [173]

16. That the said plaintiff, Charles H. Moyer, the pretended President of the pretended Western Federation of Miners, the said plaintiff, Guy E. Miller, the pretended attorney in fact of the said Charles H. Moyer, the said Ed. O'Byrne, and one John C. Lowney and one Charles Mahoney, have conspired and confederated themselves together with other members of the alleged and pretended executive board of the pretended Western Federation of Miners, for the purpose of plundering The Butte Miners' Union, a corporation, and getting possession of its funds and property, and appropriating the same to their, the said Moyer, Miller, Mahoney, Lowney and O'Byrne and others, own use.

17. That in furtherance of said conspiracy, the said Moyer, did, shortly after the 13th day of June, 1914, attempt to get possession of the money, the property of The Butte Miners' Union, a Corporation, on deposit in the banking-house of the Daly Bank and Trust Company, in Butte City, Montana, and in furtherance of said scheme of plunder did falsely and fraudulently represent to the said banking-house that it was his intention to remove the said moneys, the property of The Butte Miners' Union, a Corporation, to Denver, Colorado, for safe-keeping.

18. That the plaintiff, Western Federation of Miners, is no longer a *bona fide* labor organization. That it is but a pretense and a sham, whose only purpose is to attempt to collect moneys for the purpose of paying salaries, hotel bills *and* etc., so as to keep the above-named plaintiffs, Moyer, Miller, and the above-mentioned Lowney, Mahoney and O'Byrne, and others in idleness at the expense of the miners and others in the country, who yield to their persuasions or succumb to their bluffs.

19. That it has neither membership or standing in any of the former fields of its activity, nor its members recognized, except in the smelter of Anaconda and the stationary engineers of Butte. The said smeltermen and engineers being recognized upon their own [174] merits, and not because of their affiliations with the plaintiff, Western Federation of Miners. That since deprived of the donations and per capita of The Butte Miners' Union, a Corporation, it has not been able to pay its bills or meet its obligations in any manner, and has repeatedly appealed to The Butte Miners' Union, a Corporation, since the 13th day of June last, to advance it money to pay the bills contracted by it for gunmen to guard the said plaintiff Charles H. Moyer and others of its officers, and to pay the expense of the delegate elected by it to attend the convention held at Philadelphia. That it was unable to pay the bills for guns bought and borrowed by Moyer, upon and a few days prior to the 23d day of June, 1914, last, and lost by him and them upon the said date and the said bill was, upon the request of the plaintiff, Moyer, paid



by The Butte Miners' Union, a corporation.

20. That upon the last visit of the said Charles H. Moyer to Butte, he found it necessary to place gunmen upon the landings and in the halls leading to his room in the hotel in which he stopped and said bills, so contracted by him, were paid by the said The Butte Miners' Union, a Corporation. And if the plaintiff Moyer now came to Butte to take charge of the property of The Butte Miners' Union, a Corporation, it would require a large amount of money to supply him with guards.

21. That the said request for donations for payment of the numerous bills of the said plaintiff, Western Federation of Miners, and its officers, after the 13th day of June, 1914, became so numerous, expensive and burdensome that the loyal members of The Butte Miners' Union, a Corporation, who had remained loyal to it, during all of its troubles, refused to further vote money for the purpose of keeping Moyer and his associates living in idleness and luxury, and useless and expensive offices in the City of Denver, Colorado, hundreds of miles from a mine or miners' union, and boarding in the best hotels in the country and riding in [175] Pullman coaches, when the members of The Butte Miners' Union, a corporation, were idle and their families suffering want.

22. That all of these answering defendants are officers of The Butte Miners' Union, a corporation, and the members in good standing thereof refused to longer contribute the money of The Butte Miners' Union, a corporation, for the above-mentioned purposes, and thereby incurred the ill-will of the said

plaintiff, Western Federation of Miners, Charles H. Moyer, Guy E. Miller, Ed. O'Byrne, Charles Mahoney, J. C. Lowney, and others, who conspired and confederated together for the purpose of removing these answering defendants from office in The Butte Miners' Union, a corporation, and then wrecking the said union and appropriating its moneys and property to their own use, and for said purpose did attempt, through their paid tools, to bring proceedings to remove these defendants from office and discouraging others from assisting them in rebuilding The Butte Miners' Union, a corporation. And are now proclaiming through the press that they own the money of The Butte Miners' Union, a corporation, and will not permit the said union to rebuild its hall with its own money and credit.

23. That by reason of their acts and activities along this line, and by reason of the fear engendered in the minds of the legitimate miners of Silver Bow County, that their money would again be contributed to support the above-named plaintiff and their lackeys, they have refused to pay dues to The Butte Miners Union, a corporation, and the labor of these answering defendants have been multiplied many times.

24. That the said plaintiffs above named and those associated with them, have in every possible manner attempted to prevent The Butte Miners' Union, a corporation, from carrying on its business of protecting its members, burying their dead and caring for their sick have warned the banking-house wherein their money is deposited that if its checks are

honored, that they will bring suit against [176] the said bank for the recovery of money so paid out; have circulated many slanderous reports about these answering defendants, among others, that they were not officers of the union; that there was no union in existence, and that all moneys and properties of the said union was the property of the above-named plaintiffs.

25. These answering defendants further say: That if the plaintiffs above named are permitted to continue as they have been, that it will be impossible to build up The Butte Miners' Union, a corporation, or to increase its membership, finances or standing to what it was before.

26. That each and all of the above-named plaintiffs are insolvent; are without means, property or resources whatever, except what is secretly and privately concealed from public knowledge, and their unlawful acts can only result in great and irreparable injury to these answering defendants and to The Butte Miners' Union, a corporation, whose officers they are, and that unless restrained and enjoined from further interfering in any manner with The Butte Miners' Union, a corporation, or with its property or with these defendants in the conduct of the business of The Butte Miners' Union, a corporation, all of the interests and property they represent and are pledged to protect, will be destroyed.

27. That there is no plain, speedy or adequate remedy at law.

WHEREFORE, these answering defendants pray,

1. That the plaintiffs herein take nothing by this ac-



tion. 2. That the defendants be given judgment for their costs. 3. That during the pendency of this action, the plaintiffs herein, their servants, agents, attorneys and employees and all persons acting for them or by their authority or under their control, be temporarily restrained and enjoined from, in any manner, interfering with the business or property of The Butte Miners' Union, a corporation, or these defendants, or any of them, in the fulfillment of their duties as officers of The Butte Miners' Union, a corporation. [177] 4. That upon the final hearing of this case, that the said plaintiffs, and each of them, their servants, agents, attorneys and employees and all persons acting in their behalf or under their control, be permanently enjoined from, in any manner, interfering with The Butte Miners' Union, a corporation, or with its business affairs interfering in any manner whatsoever with these defendants or the conduct of the business of The Butte Miners' Union, a corporation.

A. C. McDANIEL and  
PETER BREEN.

State of Montana,  
County of Silver Bow,—ss.

Patrick Lee, being first duly sworn, says: That he is one of the defendants named in the foregoing answer; that he has read the said answer, knows the contents thereof, and that the same is true, except as to matters and things stated on information and belief, and as to these he believes it to be true.

PATRICK LEE.



Subscribed and sworn to before me this 19th day of February, 1915.

[Seal]

PETER BREEN,  
Notary Public for the State of Montana residing at  
Butte, Montana.

My commission expires June 2d, 1916.

Service of the foregoing answer acknowledged and  
copy received February 20th, 1915.

CANNING & GEAGAN and  
E. P. KELLY,  
Attorneys for Plaintiffs. [178]

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EXHIBIT VI.

*In the District Court of the Second Judicial District,  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization, Association of Persons  
With Its Headquarters in the City and County  
of Denver, State of Colorado, and CHARLES  
H. MOYER, President of the Western Federa-  
tion of Miners, a Voluntary Organization and  
Association of Persons, with Its Headquarters  
in the County of Denver, and State of Col-  
orado; GUY E. MILLER and ED O'BRYNE,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PATRICK  
O'NEILL, MIKE A. SULLIVAN, JAMES  
RYAN, JAMES WALSH, and PATRICK  
QUIGLEY,

Defendants.

## REPLY.

Comes now the plaintiffs above named and for reply to the answer of the defendants, herein, admit, deny, and allege as follows, to wit:

Deny, generally and specifically each and every of the allegations in said answer contained.

WHEREFORE, having fully replied the plaintiffs pray judgment in accordance with the prayer of their complaint herein.

CANNING & GEAGAN and

E. P. KELLY,

Attorneys for Plaintiffs.

State of Montana,

County of Silver Bow,—ss.

Guy E. Miller, being first duly sworn upon oath deposes and says: That he is one of the plaintiffs named in the above-entitled action and makes this verification in behalf of himself and the other plaintiffs and says that he has read the foregoing reply, knows the contents thereof, and that the same is true of his own knowledge, except as to matters and things therein stated upon [179] information and belief, and as to these matters and things he believes them to be true.

GUY E. MILLER,

Subscribed and sworn to before me this 16th day of March, A. D. 1915.

[Notarial Seal]

P. E. GEAGAN,

Notary Public in and for the State of Montana; Residing at Butte, Montana.

My commission expires Jan. 13, 1918.

[Endorsed]: Filed May 13, 1915.

## EXHIBIT VII.

## POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS, That I, Charles H. Moyer, President of the Western Federation of Miners, a voluntary organization of the City and County of Denver, State of Colorado, have made, constituted, and appointed, and by these presents do make, constitute and appoint, Guy E. Miller, of the City of Butte, State of Montana, my true and lawful attorney, for me and in my name, place and stead, to take complete charge of the affairs, including all books and papers of The Butte Miners' Union, a corporation, existing under and by authority of the laws of the State of Montana, whose headquarters are at 217 North Main Street, Butte, Montana, and to receive and file any and all charges that may be made against the local officers of said Union and to transmit the same or a copy thereof to me, and to collect and receive any and all moneys which shall be due, owing and payable and belonging to the said Butte Miners' Union; and in my name represent before any Judge or Minister of the law whatsoever, and in any court or courts of judicature, and on my behalf prosecute for any debt, fraud and any manner of claims that the said Butte Miners' Union may have against any person or persons, and to answer, defend all actions [180] or causes whatsoever relating to the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming, and

holding valid all that my said attorney shall lawfully do or cause to be done by virtue of these present.

Witness my hand and seal at Denver, Colorado, this 30th day of November, A. D. 1914.

CHAS. H. MOYER. (Seal)

President W. F. M.

State of Colorado,

City and County of Denver,—ss.

I, \_\_\_\_\_, a notary public in and for the City, County, and State aforesaid, do hereby certify that \_\_\_\_\_, who is personally known to me to be the person whose name is subscribed to the within Power of Attorney appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this \_\_\_\_\_ day of November, A. D. 1914.

My commission expires \_\_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_. [181]



EXHIBIT VIII.

*In the District Court of the Second Judicial District,  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization, Association of Persons  
With Its Headquarters in the City and County  
of Denver, State of Colorado, and CHARLES  
H. MOYER, President of the Western Federa-  
tion of Miners, a Voluntary Organization and  
Association of Persons, with Its Headquarters  
in the City and County of Denver, State  
of Colorado; GUY E. MILLER and ED  
O'BRYNE,

Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PATRICK  
O'NEILL, MIKE A. SULLIVAN, JAMES  
RYAN, JAMES WALSH, and PATRICK  
QUIGLEY,

Defendants.

ORDER TO SHOW CAUSE AND RESTRAIN-  
ING ORDER.

On the amended complaint of the plaintiff herein  
duly verified, the material allegations made posi-  
tively, a copy of which is hereto attached,

IT IS ORDERED, that the defendant above-  
named, and each of them, show cause before the  
above-entitled court in department 2 thereof, at the  
courthouse, in the City of Butte, County of Silver

Bow, State of Montana, on the 20th day of February, 1915, at 9:30 o'clock A. M. of said day, why an injunction should not be granted restraining them, and each of them, and all of their agents, servants, employees, attorneys, and anyone acting for or in their behalf or under their direction, from in any way interfering with the plaintiffs herein and the plaintiff, Charles H. Moyer, President of the Western Federation of Miners, in the possession and control of the property of The Butte Miners' Union, a corporation, pending the determination of the charges filed against the officers of said corporation, a copy of which said charges is set forth in the complaint herein, and the holding and conducting of an election by the members of said corporation for new officers, if the charges set forth in the complaint herein [182] and filed by the members of said corporation against the defendants herein, as officers of said corporation are found and proven to be true, and from interfering with the putting of the business of The Butte Miners' Union, a corporation, on a business basis.

Dated this 8th day of Feb., A. D. 1915.

JOHN B. McCLERNAN,

Judge.

Attest: [Court Seal] John J. Foley, Clerk of the District Court of the Second Judicial District of the State of Montana. By J. J. Vines, Deputy.  
[183]

EXHIBIT IX.

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization, Association of Persons  
With Its Headquarters in the City and County  
of Denver, State of Colorado, et al.,

Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PATRICK  
O'NEILL, MIKE A. SULLIVAN, JAMES  
RYAN, JAMES WALSH and PATRICK  
QUIGLEY,

Defendants.

Upon the facts adduced on the hearing of the order  
to show cause herein, the Court finds for the plain-  
tiffs and makes the following:

CONCLUSIONS OF LAW.

I. That the application to the Western Federa-  
tion of Miners for a charter by Butte Miners' Union,  
No. 1, a corporation and the granting of the same  
by the Western Federation of Miners and the ac-  
ceptance thereof by the said Union, a corporation,  
established contractual relations between the two  
bodies, legally binding on both.

II. That the amendment to the Constitution of  
the Western Federation of Miners set forth in the  
amended complaint, and known throughout the hear-  
ing as Amendment No. 2, was regularly adopted by

the Western Federation of Miners and locals constituting the same, and thereupon became and was a part of the constitution of the Western Federation of Miners and binding upon the said union, corporation, by reason of its application for and acceptance of the Charter hereinbefore mentioned, and became and was part of the contract existing between the Western Federation of Miners and the Union corporation. That whether or not it was the part of wisdom to adopt the said amendment is not a matter for consideration by this Court. [184]

III. That in accordance with the terms and provisions of said constitution, as amended, charges were regularly preferred against all of the above-named defendants, and the said defendants, so charged, with the exception of James Walsh and James Ryan, Trustees of said Union, corporation, declined and refused, after demand, to comply with the terms, conditions and provisions of the Constitution of the Western Federation of Miners, as amended.

IV. That Guy E. Miller was the duly appointed and lawful attorney-in-fact of Charles H. Moyer, president of the Western Federation of Miners, at the time of the presentation of said charges and the making of said demand, and presented said charges and made said demand pursuant to the authority in him vested by written power of attorney from said Moyer to him. That the power so delegated by said Moyer, as president of the Western Federation of Miners, was purely administrative and ministerial and could be and was legally delegated.



V. That a temporary injunction should issue herein.

IT IS THEREFORE ORDERED:

I. That a temporary restraining order issue herein, enjoining and restraining the defendants (excepting James Walsh and James Ryan), their agents, servants, employees and attorneys, or anyone acting for or in their behalf, or under their direction, from in anyway interfering with the plaintiffs Western Federaton of Miners, or Guy E. Miller, the attorney-in-fact of Charles H. Moyer, President of the Western Federation of Miners, in the possession and control of the property of the Butte Miners' Union, No. 1, a corporation, for the purposes mentioned in the said amendment to the Constitution of the Western Federation of Miners.

II. Enjoining and restraining said plaintiffs, and each and all of them, their agents, servants, employees and attorneys, or anyone acting for or in their behalf, from disposing of the whole or any part of the funds of the Butte Miners' Union, No. 1, a corporation, [185] now on deposit in any bank in Butte; from removing the same from said bank or banks, and from in any manner interferring with the same without further order of this court; and from disposing of or removing from the County of Silver Bow, Montana, any of the books, records, property or effects of said Butte Miners' Union, No. 1, a corporation.

Done in open court this 12th day of June, 1915.

JOHN B. McCLERNAN,

Judge.

## EXHIBIT X.

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization and Association of Persons  
With Its Headquarters in the City and County  
of Denver, State of Colorado, et al.,

Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PATRICK  
O'NEILL, MIKE A. SULLIVAN, JAMES  
RYAN, JAMES WALSH and PATRICK  
QUIGLEY,

Defendants.

## TEMPORARY RESTRAINING ORDER.

This matter coming on regularly for hearing on the —— day of May, 1915, on the order to show cause heretofore issued herein, plaintiffs being represented by their attorneys, Canning and Geagan & Kelly, and the defendants being present in person and represented by their counsel, Peter Breen and A. C. McDaniels, Esq., testimony was thereupon introduced on behalf of plaintiffs, and being concluded, testimony was thereupon introduced on behalf of defendants, and being concluded, and both sides having announced that the testimony on the said hearing was closed, counsel for the respective parties thereupon argued the said cause orally, and thereafter, the Court took the said order to show cause under

advisement, and the Court being fully advised in the premises: [186]

NOW, THEREFORE, it is hereby ordered, and this does order that the defendants Martin Scahill, Patrick Lee, Patrick O'Neill, Mike A. Sullivan and Patrick Quigley, be, and each and all of them their agents, servants or employees, or anyone acting for or on their behalf, or under their direction, are hereby enjoined and restrained from in any way or manner interfering with the plaintiffs, Western Federation of Miners, or Guy E. Miller the attorney-in-face of Charles H. Moyer, the President of the Western Federation of Miners in the possession and control of the property of the Butte Miners' Union, No. 1, a corporation for the purposes mentioned in the amendment to the constitution of the Western Federation of Miners as alleged in the amended complaint of plaintiffs and known throughout the hearing of the order to show cause as "AMENDMENT NO. 2."

AND IT IS FURTHER ORDERED, and this does order that the said plaintiffs, and each and all of them, their agents, servants, employees and attorneys, or anyone acting for or on their behalf are hereby enjoined and restrained from disposing of the whole, or any part of the funds of the Butte Miners' Union No. 1, a corporation, now on deposit in any bank in Butte, or from removing the same from the said bank or banks, or from in any manner interfering with the same without the further order of this court, and are hereby enjoined and restrained from disposing of, or removing from the County of

Silver Bow, Montana, any of the books, records, property or effects of the said Butte Miners' Union No. 1, a corporation.

Done in open court this 14th day of June, 1915.

JOHN B. McCLERNAN,

Judge.

### EXHIBIT XI.

RESOLUTION FOR WITHDRAWAL OF THE BUTTE MINERS' UNION, A CORPORATION, FROM THE WESTERN FEDERATION OF MINERS, A VOLUNTARY ORGANIZATION AND ASSOCIATION OF PERSONS, WITH ITS HEADQUARTERS IN THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, AND RECISION OF CONTRACT BETWEEN THE SAID BUTTE MINERS' UNION, A CORPORATION, AND THE SAID WESTERN FEDERATION [187] OF MINERS.

WHEREAS, The Butte Workingmen's Union, being an association of Miners and others, was organized on the 13th day of June, 1878, and;

WHEREAS, the said name was thereafter, by resolution of the said Butte Workingmen's Union, changed to that of the "Miners' Union," being an association of miners and others, and;

WHEREAS, the said "Miners' Union," was thereafter, upon the 18th day of April, A/D. 1881, duly incorporated under the laws of the State of Montana, and;

WHEREAS, before the date on which the said corporation would legally expire, proceedings neces-



sary to continue its corporation, were duly filed, continuing the said corporation, for the term provided by law, and;

WHEREAS, the name "The Miners' Union," was on the 24th day of August, 1914, by suitable proceedings amended to "The Butte Miners' Union," and;

WHEREAS, the said "The Butte Miners' Union, a corporation" is at present and for a period of more than thirty-one (31) years has been a corporation, duly organized and existing under and by virtue of the laws of the State of Montana, and;

WHEREAS, the Western Federation of Miners, an unincorporated voluntary organization and association of persons with its headquarters in the City and County of Denver, State of Colorado, was organized May, 1893, and;

WHEREAS, The Butte Miners' Union, a corporation, did shortly thereafter, become a local of the said Western Federation of Miners, an unincorporated voluntary organization and association, of persons, and received a charter therefrom, on May 15, 1893, and;

WHEREAS, the said charter was by a mob, destroyed, on June 13, 1914, and;

WHEREAS, The Butte Miners' Union, a corporation, did on the [188] 22d day of September, 1914, apply to the said Western Federation of Miners for a reissuance of its charter, and;

WHEREAS, the said application was, on the 3d day of October, 1914, granted, and a charter of said date duly issued and;

WHEREAS, on the 15th day of May, 1893, The

Butte Miners' Union, a corporation, had approximately five thousand (5000) members and property in excess of one hundred thousand (\$100,000) dollars, consisting of money on hand, real estate and mortgages and enjoyed the goodwill and received the co-operation of all employees and organizations of employees, and of all other elements of the community, and;

WHEREAS, since the date of May 15, 1893, and up to the 1st of December, 1914, The Butte Miners' Union, a corporation, has paid into the treasury of the said Western Federation of Miners, as per capita tax, assessments levied, and donations appealed for, a sum in excess of One Million (\$1,000,000) Dollars, and;

WHEREAS, the said The Butte Miners' Union, a corporation, between the 1st day of July, 1913, and the 1st day of July, 1914, paid as assessments to the Western Federation of Miners One Hundred Thirty-eight Thousand Eight Hundred and Twenty-five and 60/100 (\$138,825.60) Dollars, donations, Twenty-one Hundred (\$2,100) Dollars, per capita tax, Seventeen Thousand Five Hundred (\$17,500) Dollars, supplies, Five Hundred (\$500) Dollars, amounting to the total sum of One Hundred Fifty-eight Thousand, Nine Hundred and Twenty-five and 60/100 (\$158,925.60) Dollars, and;

WHEREAS, between January 5, 1914, and June 15, of the said year in dues, assessments and donations, the said The Butte Miners' Union paid to the said Western Federation of Miners, the following sums of money:

January	5.....	\$ 2,000.00
"	19.....	10,000.00
"	22.....	10,000.00
February	2.....	5,000.00
"	5.....	1,250.00

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February	16.....	10,000.00
"	23.....	1,250.00
"	23.....	100.00
March	6.....	8,000.00
"	23.....	10,000.00
"	23.....	1,250.00
April	16.....	6,000.00
"	16.....	450.00
"	22.....	8,000.00
May	20.....	1,000.00
June	4.....	1,250.00
"	15.....	3,000.00

making a total of Seventy-eight Thousand Five Hundred and Fifty (\$78,550) Dollars, and

WHEREAS, upon January 1, 1914, the Western Federation of Miners claimed that The Butte Miners' Union, a corporation, owed it a balance of Forty-four Thousand Two Hundred and Sixty-eight (\$44,268.15) Dollars, and from said date January 1, 1914, to June 2d of said year the following additional amounts:

January	1.....	\$44,268.15
"	16.....	1,250.00
"	21.....	55.00
February	1.....	15,428.00
"	5.....	1,250.00
"	10.....	166.50

March	1.....	20,317.50
“	2.....	1,250.00
“	2.....	7.50
“	18.....	1,250.00
April	1.....	20,639.50
“	10.....	1,250.00
May	1.....	19,656.00
“	7.....	1,250.00
June	1.....	7,576.00
“	2.....	1,250.00

making a total amount owing from January 1, 1914, to June 2, 1914, One Hundred Thirty-six Thousand Eight Hundred and Sixty-four and 65/100 (\$136,-864.65) Dollars, and

WHEREAS, after receiving the said sum of Seventy-eight Thousand Five Hundred and Fifty (\$78,-550) Dollars, in a period of six (6) months, the said Western Federation of Miners claims that at said time, to wit, June 15, 1914, there was due and owing from The Butte Miners' Union, a corporation, to the said Western Federation of Miners a balance of Sixty Thousand Four Hundred and Fifteen and 65/100 (\$60,415.65) Dollars, and [190]

WHEREAS, The Butte Miners' Union, a corporation, during all of the time in which the said Western Federation of Miners, demanded and received the said sums of said money above set forth from The Butte Miners' Union, a corporation, the said corporation was compelled to pay the said sums of money to the said Western Federation of Miners, through its officers and were not permitted to at any time send the money themselves to the places wherein



the said officers of the said Western Federation of Miners claimed it was wanted for, and was to be sent, and

WHEREAS, very many complaints have reached the said The Butte Miners' Union, a corporation, from the localities wherein the said money was supposed to be sent, that the same did not reach their destination, but were spent by some of the general officers and some of the members of the general executive board, who were intrusted with the distribution of the same, in all manner of debauchery, and for their own benefit, and that only a small portion of it reached the deserving families, and

WHEREAS, the reports of the Secretary-Treasurer of the Western Federation of Miners, an unincorporated association of persons as aforesaid, for the fiscal year ending June 30, 1914, as an example, shows that on the Michigan strike, on August 22, 1913, J. C. Lowney of Butte, Montana, member of the executive board, received the sum of Twenty-five Thousand (\$25,000) Dollars; on September 12, 1913, he received an additional Twenty-five Thousand (\$25,000) Dollars; on November 25, 1913, Ten Thousand (\$10,000) Dollars; on December 1, 1913, Ten Thousand (\$10,000) Dollars, making a total from August 22, 1913, to December 8, 1913, of Eighty Thousand (\$80,000) Dollars. From September 26 to October 16, 1913, inclusive, a period of twenty (20) days, Guy E. Miller, of the executive board, presumably for the same purpose, also received, September 26, Twenty-five Thousand (\$25,000) Dollars; October 2, Twenty-five Thousand (\$25,000) Dollars; October 8,

Twenty-five Thousand (\$25,000) Dollars; October 15, [191] Twenty-five Thousand (\$25,000) Dollars, making a total of One Hundred Thousand (\$100,000) Dollars in twenty (20) days. Then we find Vice-President C. E. Mahoney also handling the money for strike relief, as follows: October 24, Twenty-five Thousand (\$25,000) Dollars; October 31, Twenty Thousand (\$20,000) Dollars; November 6, Ten Thousand (\$10,000) Dollars; November 12, Ten Thousand (\$10,000) Dollars; November 17, Ten Thousand (\$10,000) Dollars, making a total of Seventy-five Thousand (\$75,000) Dollars received by Mahoney from October 24, 1913, to November 17, 1913, inclusive. In other words, Seventy-five Thousand (\$75,000) Dollars in twenty-four (24) days; and

WHEREAS, many reports have reached The Butte Miners' Union, a corporation, that strikes were being caused and called by the general officers and the general executive board for the sole purpose of collecting a large relief fund for the benefit of the general officers and those acting in concert with them, and

WHEREAS, the above amounts were given to the various parties of during practically the same period of time, and that a very short time, firmly convinces The Butte Miners' Union, a corporation, of the truth of the said accusations, more particularly so when we find in the same report the expenditures of the Western Federation of Miners for the said term, namely, July 1, 1913, to June 30, 1914, were the sum of Nine Hundred and Nineteen Thousand Five Hundred and Twenty-two and 03/100 (\$918,522.03) Dollars, almost One Million (\$1,000,000) Dollars in one (1) year, itemized as follows:

President.....	\$ 4,369.40
Vice-President.....	4,083.25
Secretary-Treasurer.....	1,857.45
Executive Board.....	12,151.89
Organizers.....	56,714.11
Miners' Magazine.....	7,062.22
Attorneys.....	10,248.56
Rent, Light & Janitor Service..	1,500.00
Office Expenses and Office As-	
sistance.....	4,399.50
Supplies.....	7,627.21
Postage.....	1,020.57
Express Charges.....	333.00
Telephone.....	93.35
Telegrams.....	895.08

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## Strike Relief—

Michigan Strike.....	728,932.79
Bingham M. U. No. 67.....	1,195.00
Blue Rapids M. & S. No. 218...	1,760.00
Craigs' M. U. No. 245.....	350.00
Ymir M. U. No. 85.....	972.00
Childrens' Christmas Fund.....	433.35
Miscellaneous Michigan Relief.	32,801.42
Miscellaneous Strike Relief....	480.00
Miscellaneous Relief.....	755.00
Miscellaneous.....	36,417.95
Drafts, Collections and Protection	
Checks.....	3,068.93

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Total.....\$191,522.03

and WHEREAS, the said Western Federation of Miners has since the reissuance of the charter on the 3d day of October, 1914, to The Butte Miners' Union, a corporation, continually attempted to get large sums of money from The Butte Miners' Union, a corporation, and in furtherance of said demand has first cajoled, and then failing in that, tried to accomplish the same ends by threats of confiscating the property of The Butte Miners' Union, a corporation, and for said purpose have brought actions in court, harassing and annoying The Butte Miners Union, a corporation, and has caused it great loss of membership, loss of money, has injured its standing, and has attempted in all manners to destroy its power and influence, and has tried to cause dissatisfaction with the membership, has prevented it from paying its debts and obligations, and through its executive officers, has repeatedly stated, that if The Butte Miners' Union, a corporation, would only lie down that everything would be alright, and that if it did not, its chosen officers would be discredited, disgraced and removed from office, and its property confiscated, and

WHEREAS, through all of the years in which the said The Butte Miners' Union, a corporation, has worked under a charter from the said plaintiff, Western Federation of Miners, that it has not received one cent of benefit in any shape, manner or form, from the said Western Federation of Miners, and [193]

WHEREAS, it seems impossible for the Western Federation of Miners, a nonresident unincorporated



association of persons, with its headquarters in Denver, Colorado, to escape from the tentacles of the present executive officers, and

WHEREAS, the said Western Federation of Miners has, since October last, frequently declared The Butte Miners' Union, a corporation, an outlaw organization, and has suspended it from any privileges, however slight, that they were unable to bestow upon it, and

WHEREAS, the said Western Federation of Miners is no longer a *bona fide* labor organization, and is without reputation or standing in any community, its income for the last quarter report being less than Six Thousand (\$6,000) Dollars from all sources, including per capita tax, donations to defense funds and contributions generally, and

WHEREAS, The Butte Miners' Union, a corporation, has but recently had its eyes opened to actual conditions, and has realized that the contract known as the charter existing between it and the said Western Federation of Miners, has been breached by the said Western Federation of Miners, and that the same is and has not been an equitable contract in which there was anything coming from the said Western Federation of Miners to The Butte Miners' Union, a corporation, and

WHEREAS, the said Western Federation of Miners refused to assist The Butte Miners' Union, a corporation, in its struggle for existence, and through no fault of The Butte Miners' Union, a corporation, has totally failed to, in return from the large sums of money paid, furnish any consideration

or assistance, but when attacked by foes within and without, because of its affiliation with the said Western Federation of Miners, and

WHEREAS, The Butte Miners' Union, a corporation, as aforesaid, has nothing in common with the said Western Federation nor has it any property belonging to it, the said Western Federation of Miners, [194] or has received nothing from it, that is emblematic of it, save the charter issued as aforesaid, and the seal of Butte Miners' Union, is willing to surrender, and

WHEREAS, during all of the years of its affiliation with the said Western Federation of Miners, *they* never was any consideration that passed from the Western Federation of Miners to The Butte Miners' Union, a corporation, in return for the vast sums of money received by it from the said The Butte Miners' Union, a corporation, and the prestage it received by reason of The Butte Miners' Union, a corporation, being known as a local of the said Western Federation of Miners, and

WHEREAS, The Butte Miners' Union, a corporation, has since October last, been doing business as a Montana Corporation, and under the seal of said corporation, and has not done business and Butte Miners' Union, No. 1, W. F. of M. since said time, and

WHEREAS, Butte Miners' Union, No. 1, intends to hereafter conduct its business as The Butte Miners' Union; therefore,

BE IT RESOLVED, that The Butte Miners' Union, a corporation, hereby rescinds and repudiates

any contract that heretofore existed and may, at present exist between the said The Butte Miners' Union, a corporation, and the Western Federation of Miners, by reason of said charter as aforesaid, or in any other way, and hereby declares the same null and void, and

BE IT FURTHER RESOLVED, that The Butte Miners' Union, a corporation, hereby withdraws from the said Western Federation of Miners, and refuses longer to affiliate with it, and

BE IT FURTHER RESOLVED, that The Butte Miners' Union, a corporation, return to the headquarters of the Western Federation of Miners, a nonresident, unincorporated, voluntary association of persons with its headquarters at Denver, Colorado, the charter received from it and the seal, and

BE IT FURTHER RESOLVED, that a copy of this resolution be sent to the papers for publication.  
[195]

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## EXHIBIT XII.

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Voluntary Organization and Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado, and CHARLES H. MOYER, President of the WESTERN FEDERATION OF MINERS, a Voluntary Organization and Association of Persons With Its Headquarters in the City

and County of Denver and State of Colorado,  
GUY E. MILLER and ED O'BYRNE,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PAT-  
RICK O'NEILL, MIKE A. SULLIVAN,  
JAMES RYAN, JAMES WALSH and  
PATRICK QUIGLEY,

Defendants.

ORDER.

On reading and filing the affidavit of Pat Lee hereto attached, the prayer of said affidavit is granted, and

It is here ordered that the sum of Eight Hundred (\$800) Dollars, or as much thereof as may be necessary, be paid to Peter Breen, Esq., as he may require it, by the Daly Bank and Trust Company of Butte, for the purpose of appealing the above-entitled action to the Supreme Court of this State, appealing from the order of this court granting an injunction *pendente lite*, and this order or a copy thereof shall be sufficient authority for said bank to pay said amount.

Dated June 26th, 1915.

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Judge. [196]



*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

No. A-6590.

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization and Association of Per-  
sons With Its Headquarters in the City and  
County of Denver, State of Colorado, and  
CHARLES H. MOYER, President of the  
WESTERN FEDERATION OF MINERS,  
a Voluntary Organization and Association of  
Persons With Its Headquarters in the City  
and County of Denver and State of Colorado,  
GUY E. MILLER and ED O'BYRNE,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PAT-  
RICK O'NEILL, MIKE A. SULLIVAN,  
JAMES RYAN, JAMES WALSH and  
PATRICK QUIGLEY,  
Defendants.

State of Montana,  
County of Silver Bow,—ss.

Pat Lee, being first duly sworn on oath says: That  
he is one of the defendants in the above-entitled ac-  
tion. That on the 12th day of June, 1915, the said  
Court made and entered its findings of fact and con-  
clusions of law in the above-entitled action. That  
said Court found against these defendants, and  
thereafter entered an order restraining these de-  
fendants from doing certain acts specified in said

order. That the affiant is an officer, to wit, secretary-treasurer of The Butte Miners' Union, a corporation. That by said order aforementioned, all of the property and money of the said The Butte Miners' Union, a corporation, was held subject to the disposition of the Court. That said Union has no other money available to pay the expenses of an appeal from said order. That affiant has been advised by his attorney that the defendants in said action have a meritorious right of appeal to the Supreme Court of this State from said order.

WHEREFORE, affiant prays that the Court make an order allowing the defendants to use as far as may be necessary, the sum of Eight Hundred (\$800) Dollars, for the purpose of perfecting an appeal and appealing the case to the Supreme Court of this State. [197] And affiant hereunto annexed and makes a part of this affidavit, the affidavit of Peter Breen.

PAT LEE.

Subscribed and sworn to before me this 26th day of June, 1915.

[Notarial Seal]                      A. C. McDANIEL,  
Notary Public for the State of Montana, Residing  
at Butte, Montana.

My commission expires Dec. 10, 1915.

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization and Association of Per-  
sons With Its Headquarters in the City and  
County of Denver, State of Colorado, and  
CHARLES H. MOYER, President of the  
WESTERN FEDERATION OF MINERS,  
a Voluntary Organization and Association of  
Persons With Its Headquarters in the City  
and County of Denver and State of Colorado,  
GUY E. MILLER and ED O'BYRNE,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PAT-  
RICK O'NEILL, MIKE A. SULLIVAN,  
JAMES RYAN, JAMES WALSH and  
PATRICK QUIGLEY,  
Defendants.

AFFIDAVIT.

State of Montana,  
County of Silver Bow,—ss.

Peter Breen, being first duly sworn on oath says:  
That he is one of the attorneys for the defendants in  
the above-entitled action, and was present during all  
of the trial of the order to show cause herein. That  
he has conferred with Frank L. Riley, the official  
stenographer of Department Two of said court, and  
the person who took all of the testimony at said hear-  
ing, and said Frank L. Riley estimates that a tran-

script of the testimony taken at the hearing of said order to show cause would cost between Three Hundred (\$300) and Four Hundred (\$400) Dollars. That affiant knows from his own experience that the printing of said transcript, the printing of [198] the brief on appeal and filing fees in the Supreme Court, will cost about Four Hundred (\$400) Dollars. That he makes this affidavit for the purpose of securing an order of the Court allowing the expenditure of Eight Hundred (\$800) Dollars, for the purpose of appealing said matter to the Supreme Court.

PETER BREEN.

Subscribed and sworn to before me this 26th day of June, 1915.

[Notarial Seal]                      A. C. McDANIEL,  
Notary Public for the State of Montana, Residing at  
Butte, Montana.

My commission expires December 10th, 1915.

### EXHIBIT XIII.

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization and Association of Per-  
sons With Its Headquarters in the City and  
County of Denver, State of Colorado, and  
CHARLES H. MOYER, President of the  
WESTERN FEDERATION OF MINERS,  
a Voluntary Organization and Association of  
Persons With Its Headquarters in the City



and County of Denver and State of Colorado,  
GUY E. MILLER and ED O'BYRNE,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PAT-  
RICK O'NEILL, MIKE A. SULLIVAN,  
JAMES RYAN, JAMES WALSH and  
PATRICK QUIGLEY,

Defendants.

NOTICE OF APPEAL.

TO THE ABOVE-NAMED PLAINTIFFS AND  
TO THEIR ATTORNEYS, MESSRS. CAN-  
NING & GEAGAN AND E. P. KELLY:

You, and each of you, will take due notice that the  
said defendants, Martin Scahill, Patrick Lee, Pat-  
rick O'Neill, Mike A. Sullivan and Patrick Quigley,  
hereby appeal to the Supreme Court of the State of  
Montana, from the order therein entered in said  
District Court on the 14th day of June, 1915, in favor  
of the said plaintiffs and against these defendants,  
and from the whole thereof, granting a temporary  
injunction.

Dated this 26th day of June, 1915. [199]

PETER BREEN,  
A. C. McDANIEL,  
Attorneys for Defendants.

Service of the foregoing notice acknowledged and  
copy received this 26th day of June, 1915.

CANNING & GEAGAN and  
E. P. KELLY,  
Attorneys for Plaintiffs.

State of Montana,  
County of Silver Bow,—ss.

I, John J. Foley, clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, do hereby certify that the foregoing is a full, true and correct copy of Notice of Appeal filed on the 26th day of June, A. D. 1915.

In testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court this 26 day of June, A. D. 1915.

[Court Seal]

JOHN J. FOLEY,  
Clerk.

By D. W. Lewis,  
Deputy Clerk.

*In the Supreme Court of the State of Montana.*

State of Montana,  
Louis and Clark County,—ss.

I, J. T. Carroll, clerk of the Supreme Court of the State of Montana, do hereby certify that the foregoing Affidavit for Writ in the cause of the State of Montana, ex rel., Butte Miners' Union, et al., Relators and Plaintiffs, vs. District Court of the Second Judicial District; Western Federation of Miners' et al., Respondents and Defendants, [200] is a true, full and compared copy of the Affidavit for Writ, in the case of the State of Montana, ex rel., No. 3697, Butte Miners' Union, et al., Relators and Plaintiffs, vs. District Court of the Second Judicial District; Western Federation of Miners' et al., Respondents and Defendants, as the same appears of record in my office.

Witness my hand and the Seal of the Supreme Court of the State of Montana, this 7 day of July, 1915.

J. T. CARROLL,  
Clerk. [201]

**Exhibit "M" to Answer—Order to Show Cause,  
State ex rel., Butte Miners' Union vs. District  
Court, etc.**

*In the Supreme Court of the State of Montana.*

THE STATE OF MONTANA on the Relation of  
THE BUTTE MINERS' UNION, a Cor-  
poration, MARTIN SCAHILL, PATRICK  
LEE, PATRICK O'NEILL, MIKE A.  
SULLIVAN and PATRICK QUIGLEY,  
Relators and Plaintiffs,  
vs.

THE DISTRICT COURT OF THE SECOND  
JUDICIAL DISTRICT OF THE STATE  
OF MONTANA, in and for the County of  
Silver Bow, and the HON. JOHN B. Mc-  
CLERNAN, One of the Judges Thereof;  
WESTERN FEDERATION OF MINERS,  
a Voluntary Organization, Association of  
Persons With its Headquarters in the City  
and County of Denver, State of Colorado;  
CHARLES H. MOYER, President of the  
Western Federation of Miners, a Voluntary  
Organization and Association of Persons  
With Its Headquarters in the City and  
County of Denver, State of Colorado; GUY  
E. MILLER and ED O'BYRNE,  
Respondents and Defendants.

## ORDER TO SHOW CAUSE.

The State of Montana to the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, and the Hon. John B. McClernan, One of the Judges Thereof; Western Federation of Miners, a Voluntary Organization, Association of Persons With its Headquarters in the City and County of Denver, State of Colorado; Charles H. Moyer, President of the Western Federation of Miners, a Voluntary Organization and Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado; Guy E. Miller and Ed O'Byrne, GREETINGS:

WHEREAS, it manifestly appears to us, by the affidavit of Martin Scahill, on behalf of all the relators herein, the parties beneficially interested, that in a certain action pending before the said District Court and Judge, wherein the said Western Federation of Miners et al., are the plaintiffs, and the said Martin Scahill et al., are the defendants, you the said Court and Judge, exercising judicial functions, have exceeded your jurisdiction and are without jurisdiction and are proceeding under mistake of law, and that you have caused, and are causing great injury to said relators by your orders, made in said action, that the injury [202] is such that it cannot be rectified on appeal to this Court, that such orders, together with the actions of the other respondents in this proceedings, interferes with the constitutional rights of said relators, and said orders were unwarranted in law and in fact, and were an



oppressive abuse of judicial discretion, and are in excess of and without jurisdiction and were made under mistake of law;

NOW, THEREFORE, You and each of you are hereby commanded to be and appear before our Supreme Court, at the courtroom thereof, in the City of Helena, Montana, on the 3d day of July, 1915, at the hour of ten o'clock, A. M. of said day, then and there to show cause, if any there be, why a writ of supervisory control should not be issued by this Court commanding you, the said District Court and the Judges thereof, to set aside, annul and for naught hold the said orders of June 12th, and June 14th, 1915, exhibits IX and X of said affidavit, and to dismiss the said proceedings, or such other order or writ as may be proper in the premises, and you, the said Western Federation of Miners, the said Charles H. Moyer, the said Guy E. Miller and the said Ed. O'Byrne, why you should not be permanently restrained from in any and all manner, interfering with the said relators in the business, affairs and property of the said The Butte Miners' Union; It is further ordered that hearing be had on said day.

And in the meantime, you and each of you, are hereby commanded to desist from all proceedings in said matter, and all proceedings arising out of, or connected with, or pertaining to, or relating to, said action, or said orders, until further order of this court.

And you and each of you, are hereby commanded, upon the service of this order upon you, to forthwith

restore to the said The Butte Miners' Union, a Corporation, all property and effects which you, or either of you, have under your possession and control.

And it is here ordered, that a copy of this order and a copy of said affidavit be served upon the said Court and Judge, that a [203] copy of this order be served upon the said Ed. O'Byrne, that a copy of this order be served upon the said Guy E. Miller for and on behalf of the said Western Federation of Miners, and that a copy of this order be served upon the said Guy E. Miller for and on behalf of the said Charles H. Moyer.

And, it is further ordered, that the sheriff of Silver Bow County, Montana, make the service herein ordered, and make the return of this order to this Court.

WITNESS, the Honorable Theodore Brantly, Chief Justice of the Supreme Court, and the seal of said court hereunto affixed, and the hand of the clerk of said court, this 28th day of June, 1915.

[Court Seal]

J. T. CARROLL,

Clerk.

In the Supreme Court of the State of Montana.

State of Montana,

County of Lewis and Clark,—ss.

I, J. T. Carroll, Clerk of the Supreme Court of the State of Montana do hereby certify that the above and foregoing, consisting of four pages, is a full, true and compared copy of the original order to show cause issued in the case of State of Montana, ex rel. Butte Miners' Union vs. District Court, on June 28, 1915, as the same appears of record in my office.

Witness my hand and the seal of said court this  
28th day of June, 1915.

J. T. CARROLL,  
Clerk. [204]

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**Exhibit "N" to Answer—Motion to Quash Order to  
Show Cause of and Dismiss Petition, State ex  
rel., Butte Miners' Union vs. District Court, etc.**

*In the Supreme Court of the State of Montana.*

THE STATE OF MONTANA on the Relation of  
THE BUTTE MINERS' UNION, a Cor-  
poration, MARTIN SCAHILL, PATRICK  
LEE, PATRICK O'NEILL, MIKE A.  
SULLIVAN and PATRICK QUIGLEY,

Relators and Plaintiffs,

vs.

THE DISTRICT COURT OF THE SECOND  
JUDICIAL DISTRICT OF THE STATE  
OF MONTANA, in and for the County of  
Silver Bow, and the HON. JOHN B. Mc-  
CLERNAN, One of the Judges Thereof;  
WESTERN FEDERATION OF MINERS,  
a Voluntary Organization, Association of  
Persons With its Headquarters in the City  
and County of Denver, State of Colorado;  
CHARLES H. MOYER, President of the  
Western Federation of Miners, a Voluntary  
Organization and Association of Persons  
With Its Headquarters in the City and  
County of Denver, State of Colorado; GUY  
E. MILLER and ED. O'BYRNE.

Respondents and Defendants.

## MOTION TO QUASH ORDER TO SHOW CAUSE AND DISMISS PETITION.

Come now the respondents and defendants above-named and move this Honorable Court to quash the Order to show cause heretofore issued out of this Honorable Court in the above-entitled cause on the 28th day of June, 1915, and directed to the above-named defendants and respondents, and to dismiss the Petition of the relators herein for a writ of Supervisory Control herein, upon the grounds and for the reason—

First. That the Petition herein for said Writ is insufficient in law.

Second. That the Petition herein does not state facts sufficient upon which to base the Order to Show Cause herein, or upon which to base a Writ of Supervisory Control. [205]

Third. Upon the ground and for the reason that the relators and plaintiffs herein, have a plain, speedy and adequate remedy in the premises by an appeal to this Honorable Court, from the order of the District Court sought to be reviewed and set aside by Supervisory Control.

Fourth. That the said Petition fails to show that the District Court, or the Honorable John B. McClerman, Judge thereof, was acting without, or in excess of his jurisdiction; or that the said Judge acted in, or is acting in an oppressive, unfair, or tyrannical manner in the premises.

Fifth. Upon the grounds and for the reason that it affirmatively appears from the said Petition, that the District Court of the Second Judicial District



of the State of Montana, had, and has jurisdiction to make the order complained of; and that the order complained of, works no injury whatsoever that cannot be remedied by Appeal, if the same order be wrong or erroneous upon the relators herein.

WHEREFORE your respondents and defendants respectively pray this motion be granted, the Order to Show Cause hereby quashed, and the Petition of the relators herein dismissed.

CANNING & GEAGAN and  
E. P. KELLY,

Attorneys for Respondents and Defendants.

Service of the foregoing Motion to Quash Order to Show Cause and Dismiss Order, acknowledged and copy received this 3d day of July, A. D. 1915.

PETER BREEN and  
A. C. McDANIEL,

Attorneys for Relators and Plaintiffs. [206]

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**Exhibit "N-1" to Answer—Answer, State ex rel.,  
Butte Miners' Union vs. District Court, etc.**

*In the Supreme Court of the State of Montana.*

THE STATE OF MONTANA on the Relation of  
THE BUTTE MINERS' UNION, a Corporation, MARTIN SCAHILL, PATRICK LEE, PATRICK O'NEILL, MIKE A. SULLIVAN and PATRICK QUIGLEY,  
Relators and Plaintiffs,  
vs.

THE DISTRICT COURT OF THE SECOND  
JUDICIAL DISTRICT OF THE STATE

OF MONTANA, in and for the County of Silver Bow, and the HON. JOHN B. McCLENNAN, One of the Judges Thereof; WESTERN FEDERATION OF MINERS, a Voluntary Organization, Association of Persons With its Headquarters in the City and County of Denver, State of Colorado; CHARLES H. MOYER, President of the Western Federation of Miners, a Voluntary Organization and Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado; GUY E. MILLER and ED. O'BYRNE.

Respondents and Defendants.

### ANSWER.

Come now the respondents and defendants above-named and make and file this their verified answer to the affidavit and petition for writ in the above-entitled action, filed herein on the 28th day of June, 1915, and admit, deny and allege as follows, to wit:

I. Admit that The Butte Miners' Union, is now, and was at all times mentioned in the affidavit for writ, on file herein, a corporation, organized and existing under and by virtue of the laws of the State of Montana, and that all of the matters and things set forth in the first paragraph of said affidavit for writ are true.

II. Admit all of the allegations in the second paragraph of said affidavit for writ; that is, the allegations setting forth of what the membership of the corporation consists.

III. Admits that Martin Scahill is the president

of said corporation, but deny that he was duly and regularly elected [207] vice-President of said corporation on the 7th day of July, 1914, or at any time, or at all. Deny any knowledge or information sufficient to form a belief as to whether or not the president of the said corporation resigned on the first day of December, 1914, and as to whether or not the said Martin Seahill took the office of president upon the resignation of December 1st, 1914; Admit that the plaintiff, Patrick Lee, is the acting secretary-treasurer of the said corporation, but deny that he is the duly elected or qualified secretary-treasurer of said corporation. Admit that Patrick O'Neill is the acting recording secretary of said corporation, but deny that said Patrick O'Neill is the duly elected and qualified recording secretary of said corporation. Admit that Mike A. Sullivan and Patrick Quigley are acting trustees of said corporation, but deny that said Mike A. Sullivan and Patrick Quigley are the duly elected and qualified trustees of said corporation.

IV. Admit the allegations contained in the fourth paragraph of said affidavit; that is, the allegations setting forth the beginning and commencing of the action in the District Court of the Second Judicial District, of the State of Montana, against the defendants Martin Seahill, Patrick Lee, Patrick O'Neill, Mike A. Sullivan, James Tyan, James Walsh and Patrick Quigley, and the proceedings had and done in said action, as set forth in said paragraph four, and that the exhibits referred to in said paragraph four are true and correct copies of the

pleadings and instruments that they purported to be copies of, save and except typographical errors.

V. Admit the allegations contained in the fifth paragraph of the affidavit for writ herein.

VI. Admit that the amendment of the constitution of the Western Federation of Miners, under and by virtue of which the plaintiffs claim the relief prayed for in the amended complaint [208] in the action in the District Court, is in words and figures as set forth in the sixty paragraph of the affidavit for writ, on file herein.

VII. Deny that the District Court was without jurisdiction, or is without jurisdiction, to make or enter the order dated June 12, 1915, and attached to the affidavit for writ as exhibit IX, was without jurisdiction, or was in excess of any jurisdiction in making and entering the order dated June 14, 1915, and attached to the affidavit for writ herein and marked exhibit X. Deny that the said Court was or is proceeding under a mistake of law or a mistake of fact. Deny that the said amendment to the constitution of the Western Federation of Miners is void for the reason set forth in the affidavit for writ, on file herein, or for any other reasons.

VIII. Deny that The Butte Miners' Union, a corporation, is interested in the proceedings in the action in the District Court numbered A-6590, or in the proceedings herein.

IX. Deny that there is no plain, speedy, or adequate remedy by appeal from the order of the District Court of June 21<sup>th</sup>, 1915, or the order of June 14, 1915, and deny that the property in control of



The Butte Miners' Union, a corporation, is taken from the said corporation or from its duly elected officers.

X. Deny that the affairs of said corporation and its property and business are placed in the hands of persons under no obligation to said corporation or whose interests are directly, or at all, derogatory to said corporation or adverse in any respect to said corporation, or who claim, or did claim, the property of said corporation for themselves or for any other person or persons whatsoever, or who intend, or ever did intend to appropriate the property of said corporation to the use of the Western Federation of Miners or any other person or persons whatsoever, or who have tried to appropriate the said property for any such use or any uses. Deny that the plaintiffs named in the [209] amended complaint, or other officers, or their agents, or their servants, or any persons working in harmony with them, intend to disrupt, disorganize and bankrupt, or disrupt, or disorganize or bankrupt the said corporation, or that they would have disrupted, disorganized, or bankrupted, said corporation before an appeal would be heard in this court or at any time, or at all. Deny that the said corporation, The Butte Miners' Union, is deprived of the right to conduct its business and affairs granted it by the laws of the State of Montana, or is deprived of its control of its affairs, property, business, rights, or that its privileges, or any privileges, are taken from it. Deny that the said order, or any *other* of the said District Court deprives Martin Seahill, Patrick Lee, Patrick O'Neill, Mike A.

Sullivan, and Patrick Quigley of any rights and privileges that they have in said corporation, save and except such rights and privileges as they may be deprived of by the members of the corporation itself acting under and by virtue of its own by-laws, rules and regulations for the conducting of its business. Deny that Guy E. Miller and the other plaintiffs in the action in the District Court and their agents, servants and persons in harmony with them or other agents, servants and persons in harmony with them, or their servants, have at any time, or at all, taken possession of, or had possession of, any part of portion of the books, records, papers, or other property of said corporation, save and except a seal which was granted to said corporation by the Western Federation of Miners and which said seal has, since the issuing of the order to show cause out of this court, been returned and given into the possession of Patrick Lee, one of the defendants in the said action in the District Court, and four other persons who accompanied him, claiming to be a committee from the said Butte Miners' Union, a corporation, which said seal was so delivered on the 29th day of June, 1915. Deny that Guy E. Miller [210] or his agents, or any of the persons named as plaintiffs in the action in the District Court, or any person in harmony with them, or any person under their direction or in their employ, or control, published, or caused to be published, the article set forth in the affidavit for writ herein alleged therein to have been published in the "Butte Daily Post" of June 16, 1915; and deny that they are in any manner, or at all, responsible for

the publication of said article; and deny that the plaintiffs in the said action in the District Court, or their agents, or other officers and servants, or servants, or any persons whatsoever in their employ, or under their control, are offering to take into membership of The Butte Miners' Union, a corporation, any person or persons upon the payment of One and no/100 (\$1) Dollar, or that they are dictating, or assuming to dictate, any of the policies, or any policy, of the said corporation or the affairs, or any affairs or the conducting of any affairs of the said corporation, or that they are depriving the said corporation of all of its rights, or any of its rights, as a corporation; or that they are depriving the members of said corporation of their inalienable rights, or any rights as members of said corporation.

Deny that the relators herein will be greatly and irreparably, or at all, damaged; or that their property is taken from their control, or that they will be unable to secure a meeting place, or to conduct the meetings of the corporation and the business of the corporation, pending an appeal from the orders of the District Court, or at all, or that the corporation is prevented from going ahead and repairing their property, save and except that pending the hearing within the corporation of the charges filed and made against the defendants in the action in the District Court by members of the corporation and the determination of said charges and the removal of said officers and the election of new officers if the charges be found true, as [211] provided for in the by-laws, rules and regulations of said corporation; and



deny that the property of said corporation will greatly, or at all, deteriorate in value by reason of any delay caused by the proceedings in the District Court, or that the business of said corporation will be irreparable, or at all, injured by the proceedings in the said District Court or by any act of these respondents and defendants, or any one under their control or in their employ. Deny that the membership of said corporation are refusing to pay dues for the purpose of keeping up the said corporation or for fear that the funds so accumulated will be turned over to Guy E. Miller and Charles H. Moyer, officers of the Western Federation of Miners, or that by reason of the failure of the membership of the said corporation to pay dues the aims and objects of the corporation will be defeated, or that the membership of said corporation will be demoralized; and, in this connection, allege the fact to be that if any of the members of said corporation are refusing to pay dues it is because of and on account of the failure of the officers of said corporation to abide by and conduct themselves in accordance with the by-laws, constitution, rules and regulations of the said corporation and its membership for the conducting of its business.

Deny that the subject matter of the action in the District Court is without the jurisdiction of the said District Court, and deny that the property and effects of The Butte Miners' Union, a corporation, have been, or are, delivered over to the plaintiffs in the said action in the District Court. Admit that by reason of the said order of the District Court



the defendants named in said action in the said District Court, save and except James Walsh and James Tyan, are enjoined and restrained from in any way or manner interfering with the plaintiffs, as set forth in said order of said District Court; and, in this connection, these answering defendants and respondents allege [212] the fact to be that under and by virtue of said order the said District Court has retained, and does retain, the right to fully control, restrain, or prohibit, the acts, or any acts, of the plaintiffs in the said action in the said District Court, and in this connection these answering respondents and defendants allege the fact to be that the plaintiffs herein, have not at any time, or at all, since the making of said order, complained to the District Court or the Honorable John B. McClerman, of said court, of any act or acts of the plaintiffs done under and by virtue of the orders of said District Court, and have not petitioned or moved the said District Court to in any way modify, change, enlarge or limit, or add to, or strike from, said order of said District Court; the power to do all of said acts is within said District Court and the Judge thereof, if properly petitioned or moved therefor and proper and sufficient showing made therein for any of said purposes or for any such relief.

Deny that the relators herein, or any of them, will suffer great and irreparable injury, or any injury pending appeal, because of the insolvency or alleged insolvency of the respondent and relators herein, and deny that the respondents and relators herein are insolvent.

Admit that the order of the District Court does not exact a bond from the said plaintiffs in the District Court in any amount; and, in this connection, allege the fact to be that the said District Court, having full and complete charge and control of all acts and things done under and by virtue of said order and having by said order restrained both parties, plaintiffs and defendants, from doing certain acts and from doing anything that would interfere with the conduct of said corporation, The Butte Miners' Union, there could be no injury done or loss sustained by the said corporation, or any person whatsoever, on account of the said order of the said District Court; and that at the time that it is alleged in the affidavit herein that counsel demanded a bond on the said order, the said demand was made in '[213] behalf of the defendant in said action in said District Court, whom, it did not appear, could suffer any injury that was not entirely reparable without a bond.

Deny that the relators will suffer great and irreparable injury by the said order of the District Court, which injury cannot be remedied by appeal by reason of the fact that the action in the said District Court was brought against the officers of The Butte Miners' Union No. 1, W. F. of M., as individuals and not against the officers, or for any reason, or at all, on account of said action; and deny that there is any confusion or will be any confusion, in the affairs of said corporation or the installation of officers in said corporation by reason of the said order of the District Court, on the 6th day of July,

1915, or at any time, or at all. These respondents and defendants deny that prior to the making of the said order of the District Court the plaintiffs, herein, or the defendants in the said District Court, were, by the Western Federation of Miners and its executive officers, or the Western Federation of Miners, or its executive officers, suspended from membership, or that The Butte Miners' Union, a corporation, withdrew, voluntarily or otherwise, from the Western Federation of Miners, on or about the 15th day of January, 1915, and prior to the making and filing of the conclusions of law and the making and entering of the order in the said District Court complained of in the affidavit of the relators herein, and as to the individual relators herein, Martin Scashill, Patrick Lee, Patrick O'Neill, M. A. Sullivan and Patrick Quigley, these answering respondents deny any knowledge or information sufficient to form a belief as to their acts in the matter of withdrawing from membership in the Western Federation of Miners, therefore, deny the same. And these relators deny any knowledge or information sufficient to form a belief as to the passage of any [214] resolution by the said Butte Miners' Union, a corporation, or the members thereof withdrawing from the Western Federation of Miners, prior to the making and entering of the said orders of the District Court, and therefore deny that any such resolution was ever made.

Deny that a resolution of The Butte Miners' Union, a corporation, was on the 15th day of June, 1915, passed by the said Butte Miners' Union, a cor-



poration, withdrawing from the Western Federation of Miners, or severing contractual relations therewith or that public notice of any such resolution was ever given to these respondents and defendants; but, in this connection, these respondents and defendants allege the facts to be that there was, on or about the 16th of June, 1915, published in the newspapers of the City of Butte, County of Silver Bow, what purported to be a resolution of The Butte Miners' Union withdrawing from the said Western Federation of Miners, and that said purported resolution so published, was claimed to have been passed at a meeting of The Butte Miners' Union, a corporation, on the 15th day of June, 1915, and after the hearing in the said District Court and after the giving and making of the said orders in the said District Court.

Deny that the relators herein will suffer great and irreparable injury, or any injury, that an appeal will not render on account of or for the reason of delay incident to the taking and making of said appeal, or that the said Butte Miners' Union, a corporation will be destroyed, or that it will be deprived of its property or the use thereof, or of its books, records or other things necessary for the conduct of its business, or that it will be compelled to incur additional expense, or any expense other than that now incurred regularly for the procuring of the quarters to meet in or for books of record, or that it will be prevented from purchasing all of its necessary supplies, books [215] and records, for the conduct of



its business, out of its funds, or that it will be prevented from caring for its sick or burying its dead.

Deny that the relators herein will suffer great and irreparable injury, or any injury, which cannot be remedied by the right of appeal on account of the cost of a transcript on appeal; and, in this connection, these relators and defendants allege the fact to be that The Butte Miners' Union, a corporation is not a party to the action in the District Court and has at no time asked to be made a party to the said action in the said District Court, and cannot and will not be injured by reason of the fact that the District Court has not and did not make an order allowing Eight Hundred and no/100 (\$800) Dollars of its funds to be expended for the purpose of securing a transcript on appeal for Martin Seahill, Patrick Lee, Patrick O'Neill, M. A. Sullivan, and Patrick Quigley, the defendants in the action in the said District Court, and allege the fact to be that it is Eight Hundred and no/100 (\$800) Dollars better off and has saved Eight Hundred and no/100 (\$800) Dollars to the benefit, use and account of its members on account of the refusal of said District Court to sign said order allowing its money and property to be expended and used for the purpose of paying for a transcript on appeal for the said individual defendants in the said action in the said District Court.

And these respondents and defendants further allege the fact to be that before presenting the said order to the said District Court and requesting the said District Court to sign said order, allowing the

use of the funds of said Butte Miners' Union, a corporation, for the preparing of a transcript, counsel for the defendants in the action in the said District Court informed the said District Court, in open court, that he would have the whole matter in the Supreme Court and before the Supreme Court of the [216] State of Montana on or before Wednesday the 30th day of June, 1915, and that thereupon the said District Court, through the Honorable John B. McClernan, Judge therein presiding, stated to said counsel of the said defendants, in said action in the said District Court, that as long as he was taking that proceedings it would be at that time unnecessary to consider the application for the use of the funds of The Butte Miners' Union, a corporation, for the purpose of preparing a transcript on appeal, and that before making any further order in the matter he would await the action of the Honorable Supreme Court of the State of Montana on whatever proceeding counsel for the plaintiffs intended to have before the said Supreme Court on or before Wednesday, the 30th day of June, 1915, and that the said Honorable John B. McClernan, Judge of said District Court, thereupon and at that time and upon the representation of counsel for the defendants in said District Court that he would have the whole matter before the said Supreme Court as hereinbefore set forth, did continue and set over the hearing upon the citation for contempt theretofore issued out of the said District Court from that day, which was Saturday the 26th day of June, 1915, to Thursday, the 1st day of July, 1915.

Admit that the defendants in the action in the District Court did, on the 26th day of June, 1915, give notice of appeal from the order of the District Court, herein complained of, and did file said notice of appeal in said District Court; and, in this connection, further allege the fact to be that on the 28th day of June, 1915, the said defendants in the said action in the District Court did file in said District Court their bond of undertaking on appeal in the sum of Three Hundred and no/100 (\$300) Dollars, signed by one C. C. Peoples and one L. Duggan and that said appeal is now pending.

These answering respondents and defendants deny that the relator, The Butte Miners' Union, a corporation, will suffer, has [217] suffered, or is suffering, any damage or injury whatsoever in its litigation in the District Court of the Second Judicial District, of the State of Montana, concerning the destruction of its hall, or any litigation in which it may be a party, on account of or *owning* to the order or orders of said District Court in the said action now pending in the said District Court; or that it has suffered, is suffering, or will suffer, any damage or injury in its action, or any action in South Dakota, by reason of the said order or orders of the District Court in the said action now pending in the said District Court or any other action; and deny that the said Charles H. Moyer, that the said Guy E. Miller, or any person or persons in their employ or under their control, or any person or persons acting in conjunction with them, are asserting the right, or have asserted the right, or are asserting the right, or have



asserted the right, or are going to assert the right to control or conduct the litigation of the said Butte Miners' Union, a corporation; and, in this connection, allege the fact to be that if any such right were asserted it would be and could be speedily passed upon and determined in the court in which the same would be asserted without any loss or injury whatsoever to any of the parties defendant in the District Court in the action therein pending or any of the parties relator herein.

Deny that the defendants in the action alleged in the affidavit for the writ herein to be pending in the Black Hills in South Dakota, in Lawrence County, in said state of South Dakota, claimed by reason of the order of the District Court of the Second Judicial District, complained of herein, to be entitled to the property therein involved, or to any property or rights of the relator The Butte Miners' Union, a corporation. Deny that by reason of the said order of the said District Court of the Second Judicial District, the Honorable John B. McClernan, presiding therein, the relators herein, or any of them, will be prevented from procuring the funds and money necessary to secure the presence of counsel and necessary witnesses to properly protect their [218] rights at the said trial in the said court of South Dakota, or in any other court.

These answering respondents and defendants admit that subsequent to the order of the said District Court made on the 14th day of June, 1914, certain individual respondents and defendants herein, along with others aside from the court and Judge of the



Second Judicial District of the State of Montana, made and filed affidavits and petitions for citation to certain of the relators herein to show cause why they should not be punished as for contempt for failing to obey the said order of the District Court, but deny that they consisted generally in claiming that the persons therein alleged to be contemnors had performed, or were performing their duties, in carrying on the business of The Butte Miners' Union, a corporation, and admit that the said District Court of the Second Judicial District, of the State of Montana, wherein the said action was pending and wherein the said citation for contempt is pending, will at the proper time, if permitted by this Court, proceed to a hearing upon said citation and to a determination thereof.

Deny that the plaintiffs herein will, by reason of the order of the District Court made as hereinbefore complained of, suffer great and irreparable injury by reason of Guy E. Miller, personal representative and attorney in fact of Charles H. Moyer, President of the Western Federation of Miners, attempting to usurp the name of The Butte Miners' Union, a corporation, for the reason that the said Guy E. Miller has not, is not, will not, and cannot usurp or attempt to usurp or appropriate the name of The Butte Miners' Union, a corporation; and deny that the relator, The Butte Miners' Union, a corporation, or any of the relators herein, will be injured on account of said Guy E. Miller calling for recruits and volunteers to build up the relator, The Butte Miners' Union to become members thereof;

and deny that the said [219] Guy E. Miller, as attorney in fact of Charles H. Moyer, President of the Western Federation of Miners, or in his individual capacity, or any one in his employ, or under his control, or acting as his agent, is at all attempting, or has at all attempted to destroy The Butte Miners' Union, a corporation; or is attempting, or has at all attempting, or will attempt to establish a rival Miners' Union organization or will usurp, or attempt to usurp the rights and privileges of The Butte Miners' Union, a corporation of or any other person or persons whatsoever.

Deny that the affiant Martin Scahill makes, or did make the affidavit for writ herein for or on behalf of all of the relators and plaintiffs in this proceeding, but in this connection allege the fact to be that he, the said Martin Scahill, made the said affidavit for the purpose of causing delay and preventing the said orders of the District Court being carried into force and effect or being proceeded under until such time as his term of office and the term of office of the individual defendants in the action in the District Court would expire, thereby attempting to entirely set at naught and to render void and useless and as a mere sham the orders of the said District Court, herein complained of.

WHEREFORE; These answering respondents and relators pray that the order to show cause herein be dismissed, and that the petition of the relators herein for a writ of supervisory control herein be dismissed, and that the respondents and defendants

herein have and recover their costs from the relators herein.

And further answering said affidavit for writ and petition for writ herein, these respondents and defendants allege:

I. That they, nor either of them nor any of them, have not at any time, or at all, save and except Ed O'Byrne, who is a member of The Butte Miners' Union, a corporation, claimed to be the [220] owner of the property of The Butte Miners' Union, a corporation, that they have not, at any time, or at all, sought to take away or remove any of the property of The Butte Miners' Union, a corporation, and that all that they have sought to do, or attempted to do, in the proceedings in the District Court, or in any other matter, has been, and is, to have carried into effect the will and desire of the members of The Butte Miners' Union, a corporation who presented and made charges in writing against the defendant officers of The Butte Miners' Union, a corporation, and to have the said charges and accusations heard and determined before The Butte Miners' Union membership or a proper committee thereof and if found true to have an election of new officers, conducted in a proper manner and in accordance with the by-laws, rules and regulations and laws of The Butte Miners' Union, a corporation, and allege that in this connection the defendant officers of The Butte Miners' Union, who were defendants in the District Court, have at all times since the filing and making of the said charges set forth in the amended complaint, in the proceeding in the District Court,



sought and endeavored to prevent the said charges from being heard and determined and to prevent themselves being tried upon the said charges.

II. That the respondents and defendants herein have, since the issuance of the order to show cause out of this court in this action, complied in every particular with the commendments of said order to show cause and have not now, nor have they had since the issuance of said order to show cause and its service upon them or any of them, any property or thing whatsoever belonging to The Butte Miners' Union, a corporation, or claimed by its officers to belong unto the said Butte Miners' Union, in their possession or under their control. That they *are* not in any manner or at all, interfered with the business of The Butte Miners' Union, a corporation, but were, prior to the issuance of said order to show [221] cause, doing everything in their power to build up, protect, and preserve The Butte Miners' Union, a corporation, and its property, and the rights, and privileges of its members, and are still desirous of doing the same, but that they have at all times been interfered with and prevented by the respondents, Martin Seahill, Patrick Lee, Patrick O'Neill, M. A. Sullivan and Patrick Quigley, from doing anything whatsoever toward carrying out the will of the membership of said corporation or enforcing the laws, rules and regulations of said corporation.

III. That they have at all times acted within the by-laws, constitution, rules and regulations and the charter contract of The Butte Miners' Union, a cor-



poration, and the Western Federation of Miners, as the same are and appear, and have acted within and in accordance with the laws of the State of Montana and not contrary to the said laws of the State of Montana, and are now seeking to do the same.

IV. That the following is a true and correct statement of the proceedings in the action in the District Court of the Second Judicial District, of the State of Montana, referred to in the affidavit of Martin Scahill for writ herein and in which proceeding the restraining order and injunction, complained of, was issued as the same appears from the register of actions and the journal of the District Court, of the Second Judicial District, of the State of Montana;

The action of the Western Federation of Miners, a voluntary organization, association of persons, with its headquarters in the City and County of Denver, State of Colorado, Charles H. Moyer, president of the Western Federation of Miners, a voluntary organization and association of persons, with its headquarters in the City and County of Denver, and State of Colorado; Guy E. Miller and Ed O'Byrne, as plaintiffs, against Martin Scahill, Patrick Lee, Patrick O'Neill, Mike A. Sullivan, James Ryan, James Walsh and Patrick Quigley, as defendants, seeking [222] on injunction against the said defendants, was begun in the District Court of the Second Judicial District of the State of Montana, on the 17th day of December, 1914, by the filing of a complaint in said court, and summons was thereupon issued by the said Court.

On the 19th day of December, 1914, the order to

show cause which was issued out of the said court and signed by Judge Jeremiah J. Lynch on the 17th day of December, 1914, along with the summons so issued, was returned served and filed.

On the 21st day of December, 1914, a motion to quash the service of summons and the order to show cause was set for hearing December 28th, 1914, the said motion to quash service of summons being filed on the same day, and the order to show cause was set for hearing on December 28th, 1914.

On December 28th, 1914, the order to show cause was continued for hearing until December 29th, 1914, and the motion to quash was taken under advisement.

On December 29th, 1914, the motion to quash was granted and the order to show cause dismissed; plaintiffs were granted an exception and twenty days to prepare and serve a bill of exceptions, as appears from Journal A J., page 325, of the District Court of the Second Judicial District of the State of Montana, which reads as follows (after title of court and cause):

“This day, the motion of defendants to quash the alleged service of summons herein, heretofore taken under advisement, is by the Court granted, to which ruling of the Court counsel for the plaintiffs herein excepted and asked for and was by the bill of exceptions thereto. Thereupon, the order to show cause herein was by the Court ordered dismissed.”

That the said summons, or alleged summons, the service of which is referred to as being quashed by the above minute in the journal of said court is as follows, to wit: [223]

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Vol-  
untary Organization, Association of Persons  
With Its Headquarters in the City and County  
of Denver, State of Colorado, and CHARLES  
H. MOYER, President of WESTERN FED-  
ERATION OF MINERS, etc., et al.,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PATRICK  
O'NEILL, MIKE A. SULLIVAN, JAMES  
RYAN, JAMES WALSH and PATRICK  
QUIGLEY,

Defendants.

The State of Montana Sends Greetings to the Above-  
named Defendant:

You are hereby summoned to answer the complaint  
in this action which is filed in the office of the clerk  
of this court, a copy of which is herewith served  
upon you, and to file your answer and serve a copy  
thereof upon the plaintiffs' attorney within twenty  
days after the service of this summons, exclusive of  
the day of service; and in case of your failure to ap-  
pear or answer, judgment will be taken against you  
by default, for the relief demanded in the complaint.

WITNESS my hand and the seal of said court this  
17 day of December, A. D. 1914.

[Seal]

JOHN FOLEY,  
Clerk.

By J. F. Driscoll,  
Deputy Clerk.

Sheriff's Office,  
County of Silver Bow, Montana.

I do hereby certify that I received the within Sum-  
mons on the 18th day of December A. D. 1914, and  
personally served the same on the 18th day of Dec.  
A. D. 1914, and by exhibiting the original and de-  
livering a true copy thereof, together with a copy  
of the complaint and order to show cause in said  
action to Martin Seahill, Patrick Lee, Patrick  
O'Neill, Mike A. Sullivan, James Ryan, James  
Walsh and Patrick Quigley and after due and dili-  
gent search and inquiry was unable to find .....  
..... 1, in the County of Silver Bow, Montana,  
.... being the defendant. [224]

Dated this 19th day of December, A. D. 1914.

JNO. BERKIN,  
Sheriff.

By M. McPherson,  
Deputy.

Copy .....	\$——
Service .....	\$——
Mileage .....	\$——
	———
Total,	\$——

[225]



[Endorsed]: Ent. No. A-6590. In the District Court of the Second Judicial District of the State of Montana, Silver Bow County. Western Federation of Miners, etc., et al., Plaintiffs, vs. Martin Scahill, et al., Defendants. Summons. Filed Dec. 19, 1914. John J. Foley, Clerk. By J. F. O'Brien, Deputy Clerk. Canning & Geagan, Attorneys for Plaintiff.

That thereafter, on the 13th day of December, 1914, summons was issued out of the above-entitled court, in the above-entitled cause, as follows:

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

WESTERN FEDERATION OF MINERS, a Voluntary Organization, Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado, and CHARLES H. MOYER, President of the WESTERN FEDERATION OF MINERS, a Voluntary Organization and Association of Persons, With Its Headquarters in the City and County of Denver, and State of Colorado; GUY E. MILLER and ED O'BYRNE,  
Plaintiffs,

vs.

MARTIN SCAHILL, PATRICK LEE, PATRICK O'NEILL, MIKE A. SULLIVAN, JAMES RYAN, JAMES WALSH and PATRICK QUIGLEY,  
Defendants.

The State of Montana Sends Greetings to the Above-named Defendants:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness my hand and the seal of said court this 31st day of Dec. A. D. 1914.

[Seal]

JOHN FOLEY,

Clerk.

By J. F. O'Brien,

Deputy Clerk. [226]

Sheriff's Office,

County of Silver Bow, Montana.

I do hereby certify that I received the within Summons on the 2d day of January, A. D. 1915, and by exhibiting the original and delivering a true copy thereof, together with a copy of the Complaint in said action of Martin Seahill, Patrick O'Neill, Mike A. Sullivan, Richard Quigley and Patrick Lee and after due and diligent search and inquiry was unable to find James Ryan and James Walsh in the County of Silver Bow, Montana, they being the defendants named in said Summons.

Dated this 1st day of February, A. D. 1915.

CHAS. S. HENDERSON,  
Sheriff.

By P. A. Stevens,  
Deputy.

Copy .....	\$	—
Service .....	\$5.00	—
Mileage.....	\$1.00	—
<hr/>		
Total	\$6.00	—

[Endorsed]: Ent. No. A-6590. In the District Court of the Second Judicial District of the State of Montana, Silver Bow County ..... Plaintiff, vs. .... Defendant. Summons. Filed L, 1915, John J. Foley, Clerk. By J. F. O'Brien, Deputy Clerk. Canning & Geagan, Attorneys for Plaintiffs.

And on the 2d day of January, 1915, an order to show cause was issued out of the above-entitled court, signed by Jeremiah J. Lynch, Judge of said court, made returnable on the 4th day of January, 1915, at 10 o'clock, A. M.

That thereafter, on January 2d, 1915, the affidavit of Patrick O'Neill, was filed in the above-entitled action, disqualifying Judge Jeremiah J. Lynch.

That on the same day an order shortening time of hearing on order to show cause was signed and filed in the above-entitled action. [227]

On January 4th, 1915, John B. McClernan was called in to hear and pass upon all pending matters and try this case, and the case was ordered transferred to Department II of this court, as appears by

Journal A J, page 337, thereof, and as appears by Register of Actions No. 1 of Transferred Cases of Department II, by the following entry: "1915, Jan. 4, Cause Transferred from Dep. I."

January 4, 1915, motion to quash summons and the service thereof filed.

January 4, 1915, order to show cause continued for hearing until January 6, 1915.

January 6, 1915, order to show cause continued for hearing until January 13, 1915.

January 11, 1915, Judge J. Miller Smith of the First Judicial District, called in to try case, Judge John B. McClernan being at that time, forced, on account of previous agreement, to hold court at Boulder, Jefferson County, Montana, in the Fifth Judicial District.

January 13, 1915, order to show cause continued for hearing until January 14, 1915, at 10 A. M.

January 14, order to show cause continued for hearing until January 15, 1915, J. Miller Smith declining to hear the case on account of being compelled to return to Helena.

January 15, 1915, order to show cause continued for hearing until January 16, 1915.

January 16, 1915, leave to file amended motion to quash granted and amended motion to quash filed. Order to show cause continued for hearing until January 21, 1915.

January 20, 1915, subpoena returned, served and filed.

January 21, 1915, order to show cause continued for hearing until January 25, 1915.



January 25, 1915, argument on motion to quash service of [228] summons; not being concluded, continued to Saturday 30, 1915.

January 30, 1915, motion to quash order to show cause filed. Affidavit filed. Motion to dismiss filed. Demurrer to complaint filed. Motion to quash summons and to quash service of summons denied. Exception noted and twenty days to prepare and serve bill of exceptions. Motion to quash order to show cause denied. Motion to dismiss denied. Demurrer to complaint taken under advisement.

February 1, 1915, summons returned served, except James Ryan and James Walsh, and filed. Subpoena returned served and filed. Order to show cause returned, served and filed.

February 6, 1915, demurrer sustained; two days to amend. Order to show cause dismissed.

February 8, 1915, amended complaint filed, and order to show cause issued out of the above-entitled court, signed by John B. McClerman, Judge, directed to the defendants.

February 10, 1915, praecipe for subpoenas filed.

February 20, 1915, motion to quash order to show cause dated February 8, 1915, filed. Motion to quash denied; exception and twenty days to prepare and serve bill of exceptions. Demurrer to amend complaint filed. Demurrer overruled; exception and twenty days to prepare and serve bill of exceptions. Leave to file answer granted. Answer filed. Motion to require plaintiffs to elect upon which cause of action stated in the amended complaint they, or either of them, would proceed and to elect upon which plain-

tiffs will prosecute this action filed. Motion denied; exception and twenty days to prepare and serve bill of exceptions. Demand for records filed. Testimony on order to show cause heard; not concluded, continued to February 27, 1915. Order to show cause returned, served and filed. Bill of exceptions sign, settled, allowed and filed. Propose amendments to bill of exceptions filed.

February 24, 1915, demand to produce records filed.

February 27, 1915, testimony on order to show cause [229] heard; not concluded, continued to March 18, 1915.

February 27, 1915, subpoena *duces tecum* returned unserved and filed. Subpoena *duces tecum* returned served, except Patrick O'Neill, and filed. Subpoena returned served and filed.

March 13, 1915, praecipe for default filed.

March 13, 1915, entry of default by clerk filed.

March 16, 1915, order shortening time of notice filed. Reply filed.

March 18, 1915, affidavit in opposition to affidavit and motion to set aside default filed. Order to show cause continued for hearing until March 29, 1915.

March 29, 1915, order to show cause continued for hearing until March 31, 1915.

March 31, 1915, order to show cause continued for hearing until April 2, 1915.

April 2, 1915, order to show cause continued for hearing until April 15, 1915.

April 15, 1915, order continuing order to show cause of hearing ordered vacated.

May 1, 1915, further hearing on order to show cause set for May 12, 1915.

May 10, 1915, praecipe for subpoenas filed.

May 12, 1915, further hearing on order to show cause continued for hearing until May 13, 1915.

May 13, 1915, reply filed on March 16, 1915, refiled as of this date, motion to set aside default having been by the court granted and reply ordered filed.

May 13, 1915, testimony heard; not concluded, continued to May 14, 1915.

May 14, 1915, testimony heard, not concluded, continued to May 17, 1915. Subpoena returned served and filed.

May 17, 1915, testimony heard on order to show cause; not concluded continued to May 18, 1915.  
[230]

May 18, 1915, hearing an order to show cause continued to May 19, 1915.

May 19, 1915, hearing an order to show cause resumed; not concluded, continued to May 20, 1915.

May 20, 1915, hearing resumed; not concluded, continued to May 21, 1915.

May 21, 1915, hearing resumed; not concluded, continued to May 24, 1915.

May 24, 1915, testimony on order to show cause resumed and concluded. Argument set for hearing on May 27, 1915.

May 25, 1915, subpoena returned served and filed.

May 27, 1915, argument continued for hearing until June 1, 1915.

June 1, 1915, bills of exception signed, filed, allowed and settled.

June 1, 1915, argument resumed; not concluded, continued to June 2, 1915.

June 2, 1915, argument of counsel resumed and concluded. Order to show cause taken under advisement.

June 2, 1915, stenographer's notes filed. Stenographer's fees, \$6. Exhibits filed.

June 12, 1915, conclusions of law and decision of court on order to show cause filed. Defendants granted an exception and given thirty days to prepare and serve bill of exceptions.

June 14, 1915, temporary restraining order signed by court (a copy of which said temporary restraining order is attached to the affidavit of the relators herein).

June 17, 1915, order for citation for contempt signed and filed.

June 18, 1915, citation returned served and filed.

June 19, 1915, order returned served and filed.

June 26, 1915, defendants pleaded not guilty of contempt.

June 26, 1915, hearing on order to show cause why defendants [231] should not be punished for contempt continued to July 1st, 1915.

June 26, 1915, affidavit and order filed.

June 26, 1915, notice of appeal filed.

June 28, 1915, undertaking on appeal filed.

July 1, 1915, hearing an order to show cause why defendants should not be punished for contempt continued to July 8th, 1915.

That the above-set forth data in the case appears from the register of actions and the journals in the District Court of the Second Judicial District of the



State of Montana and from the files in the office of the clerk of the court of said district. That the notice of appeal mentioned above as being filed on the 26th day of June, 1915, is the notice of appeal of the defendants from the order and decision of the above-entitled court upon the completion of the hearing of the order to show cause; and that the undertaking on appeal above mentioned as filed on the 28th day of June, 1915, is the undertaking on appeal, in the sum of \$300, filed by the defendants, and which undertaking on appeal is signed by C. C. Peoples and L. Duggan, two residents of the county of Silver Bow, State of Montana. And that the said citation for contempt above referred to as being filed on the 17th day of June, 1915, is a citation for contempt issued to the defendants, except James Ryan and James Walsh, upon the affidavits of Guy E. Miller, one of the plaintiffs, and Charles Mahoney, claiming that the defendants disobeyed and disregarded the order of the above-entitled court made and entered on the 14th day of June, 1915, and that the same is now pending and has not been heard.

That the said respondent Honorable John B. McClerman has not at any time or at all during the pendency of this action, or at any other time, acted in an arbitrary, oppressive or tyrannical manner towards the defendants in the above-entitled action in the said district court, or any of them, and has had no intention or desire to so act, towards the said defendants, or any [232] other person or persons whatsoever in the said action named or interested, and has been guided entirely by the law and the

facts as they have appeared to him upon the hearing of the order to show cause in the said action. [233]

WHEREFORE: These respondents and defendants, having fully answered, they pray that the petition for writ of supervisory control, or other writ herein, be dismissed; that the order to show cause heretofore issued herein be dismissed; that the restraining order in said order to show cause, herein contained, be dismissed, and that the defendants and respondents have and recover their costs from the relators herein.

CANNING & GEAGAN,  
E. P. KELLY,

Attorneys for Respondents and Defendants.

State of Montana,  
County of Silver Bow,—ss.

John B. McClernan, being first duly sworn upon oath, deposes and says: That he is one of the Judges of the District Court of the Second Judicial District, of the State of Montana, that he is the judge named as one of the respondents in the above-entitled cause; that he has read the foregoing answer, knows the contents thereof, and that the same is true of his own knowledge, as to all matters and things set forth therein relating to the proceedings in the District Court and the acts of the Judge, and as to the others he believes them to be true.

JOHN B. McCLERNAN.

Subscribed and sworn to before me this 2d day of July, A. D. 1915.

[Notarial Seal] P. E. GEAGAN,  
Notary Public for the State of Montana; Residing at  
Butte, Montana.

My commission expires June 13, 1918.

State of Montana,  
County of Silver Bow,—ss.

Guy E. Miller, being first duly sworn upon oath, deposes [234] and says: That *he one* of the persons named as respondents and defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated upon information and belief; and, as to these matters and things, he believes them to be true; and that he makes this verification in behalf of himself and each and all of the respondents and defendants herein.

GUY E. MILLER.

Subscribed and sworn to before me this 2d day of July, 1915.

[Notarial Seal] P. E. GEAGAN,  
Notary Public for the State of Montana; Residing at  
Butte, Montana.

My commission expires Jan. 13, 1918.

Service of the foregoing Answer acknowledged and copy received this 3d July, 1915.

\_\_\_\_\_,  
\_\_\_\_\_,  
Attorneys for Relators. [235]

**Exhibit "O" to Answer—Order Annulling Order  
Directing Issuance of Injunction Western Fed-  
eration of Miners et al. vs. Scahill et al.**

3697.

State ex rel. Scahill vs. District Court.

The order directing an injunction to issue in the case of Western Federation of Miners et al. vs. Martin Scahill et al., made on June 12, 1915, is annulled and the district court is ordered to set it aside.

Opinion to be delivered at the convenience of the Court.

Service of the foregoing answer accepted and copy received this 17th day of November, 1915.

CANNING & GEAGAN,

P. E. GEAGAN,

E. P. KELLY,

O. N. HILTON,

Attorneys for Plaintiffs.

Filed November 18, 1915.

[Endorsed]: Title of Court and Cause. Answer.  
Filed November 17, 1915. Geo. W. Sproule, Clerk.  
By Harry H. Walker, Deputy Clerk. [236]

**Order Amending Bill of Complaint.**

That thereafter on February 11th, 1916, on Motion of Complainants, the Court allowed to be struck from the Bill of Complaint and the Bill of Complaint amended by striking therefrom the names of the complainants, Thomas Owen, J. E. Commins, Charles Pogorelic, Yanco Terzich, J. C. Williams, C.



E. Bright, Charles Detrich, William Burns, J. A. Herndon, Thomas McManus, E. G. Lock, James Hanley, W. T. Quinn, Phillip Ryan, William Stanlick, Guy E. Miller, Rufus Blaylock, Thomas Gorman, Emanuel De Mio, L. S. Sexton, Samuel W. Monroe, William Davidson, Frank Phillips, James Roberts, Joseph Gorman, and M. C. Leake, and the citizenship and residents of the said named persons.

Said order granting said motion being as follows:

“This cause came on regularly at this time on the motions heretofore filed herein, to amend bill of complaint and to strike from answer and for trial. P. E. Geagan and O. N. Hilton, Esqs., appearing on behalf of the plaintiffs and Peter Breen, Esq, on behalf of the defendant. Thereupon motions to amend bill of complaint and to strike from answer, argued and submitted and thereupon the Court, after due consideration, ordered that the motion to amend the bill of complaint be granted. Thereupon defendant objects to the ruling of the Court, and exception noted.”

Entered in open court Feb. 11, 1916.

GEO. W. SPROULE,

Clerk.

By Harry H. Walker,

Deputy Clerk.

And on May 13th, 1916, the opinion of the Court was filed herein as follows, to wit: [237]

*United States District Court, Montana.*

CHARLES H. MOYER et al.

vs.

THE BUTTE MINERS' UNION.

Herein, the Court denies the plaintiffs' motion to strike from the answer in that it comes too late. And upon the trial of the suit the Court finds for the defendant and concludes it is entitled to decree as prayed for. The attached opinion is made a part hereof.

BOURQUIN, J.

[Endorsed]: Title of Court and Cause. Memo. Filed May 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. [238]

*In the District Court of the United States, in and for  
the District of Montana.*

No. 33—IN EQUITY.

CHARLES H. MOYER et al.,

Plaintiff,

vs.

BUTTE MINERS' UNION,

Defendant.

### Opinion.

Plaintiffs sue in behalf of themselves and all other members of the Western Federation of Miners, an unincorporated association, to compel defendant, an incorporated labor union, to specifically perform a contract to transfer all its property to the Federation. Defendant denies the contract, pleads it is

*ultra vires*, and seeks to quiet title. It appears defendant, the ordinary labor union, with incidents of dues and benefits, was incorporated in 1881 under laws of Montana permitting incorporation of churches, secret societies, granges, and like associations. 1879, R. S. Mont. 463. These laws provided that articles setting out the association's business or objects and "The number of trustees to conduct the same" should be filed by the trustees, whereupon the association would become a body corporate, with power "to establish a constitution and by-laws and make all such rules and regulations as may be deemed expedient" for admission to and termination of membership and "for the management of its affairs, in accordance with law," and to hold and dispose of property. Defendant's articles declared its objects to be to promote and protect the interests of its members, to hold property necessary to that end, and to establish branches subject to defendant's rules and regulations. The applicable laws were subsequently re-enacted, but the changes therein did not enlarge the powers conferred. See 8th Sess. Laws, p. 141.

In 1893 delegates from defendant and other labor unions organized the Federation, and for it adopted a constitution and by-laws providing for government over both unions and their members, with penalties, fines, and expulsion for *any their* violation. For instance, unions [239] were forbidden to strike until ordered by a two-thirds vote taken with prior approval of Federation officers; unions could be ordered on sympathetic strike by Federation offi-

cers; when any union was in "trouble" Federation officers should be "summoned and given full charge in the direction of negotiations"; unions could not enter into wage agreements with employers, save for a specific time and with the approval of Federation officers; unions should try members who violate their obligation to the Federation, etc., final judgment being with the Federation, the latter also having power to try any union's members and to render final judgment; unions should permit members to withdraw and members from other unions to join; propositions could be settled by a referendum to all members of the Federation; unions should administer to initiates the obligation of fidelity to the Federation by it prescribed, and should elect officers in accordance with Federation law; any union reduced to less than ten members "may be considered defunct, and surrender its charter and books to the Federation," the union's property by the Federation to be held in trust for one year, to be returned to the union, if reorganized, otherwise to become property of the Federation.

A form of charter to be issued to unions also was adopted, wherein it was provided that thereby the union was authorized and empowered to transact business and to initiate members in accordance with the Federation's laws and rules; that the union would conform to said laws and rules, in default of which the charter could be revoked and the union suspended; that, should the "union withdraw or be dissolved, suspended, or forfeit this charter, then all property, moneys, books, and papers shall become



the property of the" Federation; and concluding that, in consideration of the union's compliance with Federation laws, the Federation would "sustain" the union "in the exercise of all rights, privileges and benefits as a local union under its protection."

[240]

In 1893 defendant received a charter from the Federation, but denies the allegation of the complaint that it contained that aforesaid termed "property forfeiture clause." In 1914 this charter was destroyed in the Butte riots, and defendant sought its reissuance. The Federation issued a charter, and after some delay defendant refused to accept it because of said forfeiture clause therein, and withdrew from the Federation. Thereupon this suit was commenced. The complaint ignores all prior to the 1914 charter, and alleges only it and its acceptance by defendant as the contract of which specific performance is sought.

The answer, however, sets out all the foregoing. It also pleads matter tending to show misconduct of Federation officers (fit subject for internal discipline), and that defendant had made a poor bargain, all of no materiality to the issues. The plaintiffs' case would have failed, but for that the suit has been tried as though the complaint alleged the contract or arrangement between the Federation and defendant (the constitution, by-laws, and 1893 charter), instead of alleging only a copy (the 1914 charter) of part of it.

It is observed that the situation is not that of a subordinate union association lawfully created by,

deriving its powers from and subject to the control of, a superior union organizaion, seceding therefrom, but it is that of an independent corporation, created by the State, with powers conferred and duties imposed upon it by the State, and subject to no control save its own and that of the State, repudiating an arrangement by which it had surrendered those powers and duties to an organization created by defendant, and assuming to exercise its powers and perform its duties itself.

With that in mind, the defense of *ultra vires* is made out. Defendant derived all its powers from the State, and could do nothing, enter into no contracts, not within the powers so granted. By the law of its incorporation and its articles, defendant was vested with certain powers. It was created an independent body, subordinate to none other, but with authority to establish branches subordinate, and not [241] superior, to itself. All its powers were to be exercised by itself—by its members, officers, and trustees. Their judgment, discretion, and policy were to control in all that concerned defendant. No power was given it to abdicate the authority conferred upon it by the State and to subordinate itself and its interests to any other persons or associations. It was given no power to relinquish self-control and management, and to bind itself to accept the judgment, discretion, and policy of others. Any contract or agreement assuming to do these latter would be beyond its powers, and so invalid.

It is apparent its contract or agreement with the Federation, hereinbefore set out, is of this character.

Under it defendant was practically reduced to merely registering the Federation's will. Defendant could not even determine its own membership. It could be compelled to strikes and other acts, perhaps against its interests and will, when ordered by the Federation, on penalty of otherwise being expelled, and forfeiture of all its property. And not it, but the Federation, was to in effect perform the duties and obligations imposed upon defendant by the State when defendant was incorporated. The law forbids all this.

Hence, if the stipulation by virtue of which plaintiffs assert a right in the Federation to defendant's property was in the 1893 charter, it is a nonseverable part of an entire and *ultra vires* contract or agreement, and so unenforceable. Somewhat analogous cases are *Grand Court vs. Court Cavour* (N. J.), 88 Atl. 191; (s. c.), 91 Atl. 1068; *Goodman vs. Lodge No. 7* (Md.), 9 Atl. 13; *Lodge No. 299 vs. Ellsworth* (Cal.), 20 Pac. 399.

(2) To complete the case, however, it is found that the evidence is insufficient to establish that said stipulation was in the 1893 charter. Without reciting all the evidence, it is in conflict, and the preponderance of it in quantity and quality, taken as a whole, is not with plaintiffs. The delegates forming the Federation met in defendant's hall, and the evidence is persuasive that after they adopted a form of charter, at a meeting of defendant the stipulation in question was objected to, and a form without it was printed by order of defendant and issued [242] to it by the Federation. This is supported by testi-



mony of both parties that the charter of 1893 was not a duplicate of other charters then issued, but contained an honor roll of certain of defendant's members, which differentiated it from the other charters, and of which the Aspen charter, issued amongst the first is in evidence. Further support is found in the likelihood that defendant, the inspiration of the Federation, the only owner of property of consequence, probably of ability to stand alone, and always the mainstay of the Federation, would not hazard its property upon an experimental Federation, wherein it might be outnumbered, and that the other unions desirous of its alliance would yield the point.

This, too, might account for the fact that defendant's charter was of date May 15, 1893, though the first charters printed by the Federation were ordered May 20, 1893, and the price fixed and the unions given numbers apparently for charters on June 16, 1893, which is also the date of the Aspen charter, No. 6. And this might also account for the founding of plaintiffs' suit on the 1914 charter, instead of upon that of 1893. When, in defendant's judgment it was for its interests to withdraw from the Federation, it could of right do so, whether wise or unwise, and without forfeiture of its property.

Decree for defendant.

..

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Judge.

Filed May 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. [243]

That thereafter, the Decree of Court was filed herein, May 15, 1916, as follows, to wit: [244]



*In the District Court of the United States in and for  
the District of Montana.*

No. 33—IN EQUITY.

CHARLES H. MOYER, as Trustee for the WEST-  
ERN FEDERATION OF MINERS, a Vol-  
untary Unincorporated Association of Per-  
sons With Its Headquarters in the City and  
County of Denver, State of Colorado,  
CHARLES H. MOYER, C. E. MAHONEY,  
ERNEST MILLS, THOMAS OWNE, J. E.  
COMMINS, CHARLES POGORELIC,  
YANCO TERZICH, J. C. WILLIAMS,  
C. E. BRIGHT, CHARLES DETRICH,  
WILLIAM BURNS, J. A. HERNDON,  
THOMAS McMANUS, E. G. LOCK,  
JAMES HANLEY, W. T. QUINN,  
PHILIP RYAN, WILLIAM STANLICK,  
GUY E. MILLER, RUFUS BLAYLOCK,  
THOMAS GORMAN, EMANUEL DE MIO,  
L. S. SEXTON, SAMUEL W. MON-  
ROE, WILLIAM DAVIDSON, FRANK  
PHILLIPS, JAMES ROBERTS, JOSEPH  
GORMAN, and M. C. LEAKE, as Members  
of the Western Federation of Miners a Vol-  
untary Unincorporated Association of Per-  
sons With Its Headquarters in the City and  
County of Denver, Colorado,

Plaintiffs,

vs.

THE BUTTE MINERS' UNION, a Corporation,  
Defendant.

## DECREE.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That the plaintiffs take nothing by this action;

That the plaintiffs, and each of them, and their servants, agents, representatives, attorneys, employees and all persons acting for them, or either of them, or by their authority, or by the authority of either of them, or in their behalf, or in the behalf of either of them, or under their control, or under the control of either of them, be and they, and each of them, are hereby permanently restrained and enjoined from in any manner interfering with or asserting any claim to, or claiming, any of the property, real, personal or mixed, of the defendant;

That the defendant is hereby adjudged and decreed to be the sole [245] owner of and entitled to the possession of the property described in the bill of complaint of plaintiffs, and described as follows, to wit:

The south fifty (50) feet of lot numbered one (1) and the south fifty (50) feet of lot numbered (2) and the south fifty (50) feet of the east twenty-one (21) feet of lot numbered three (3) all in block numbered eleven (11) of the Butte Townsite, according to the official plat and survey thereof of record in the office of the county clerk and recorder of Silver Bow County, Montana.

A note and mortgage to secure the said note for the sum of twenty-five thousand (\$25,000) dollars, given

by the Lead City Miners' Union, a corporation of the state of South Dakota, to The Butte Miners' Union, the defendant herein. The mortgage securing said note having been heretofore foreclosed and the property of the Lead City Miners' Union in Lead, So. Dakota, having been sold at sheriff's sale under said foreclosure, and having been bought in for and in behalf of the said The Butte Miners' Union, the defendant herein;

All money and certificates of deposit in the Daly Bank and Trust Company of Butte, Montana;

Any and all books, papers, seals and other property.

Dated and done this 15 day of May, 1916.

GEO. M. BOURQUIN,

Judge.

Title of court and cause. Decree. Filed and entered. May 15, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. [246]

And thereafter, on the 4th day of November, 1916, the Statement of Evidence was filed herein, having been approved by the Judge of said court, the same being as follows, to wit: [247]

**Testimony of Charles E. Mahoney, for Plaintiffs.**

CHARLES E. MAHONEY, one of the plaintiffs herein, called as a witness on behalf of plaintiffs, being duly sworn, testified as follows:

Direct Examination by Mr. GEAGAN.

The WITNESS.—I am the same Charles E. Mahoney who is named as a plaintiff in this Bill of Complaint in this action.

(Testimony of Charles E. Mahoney.)

Q. Where do you reside?

Mr. BREEN.—Just a moment, if your Honor please. At this time the defendants object to the introduction of any testimony whatever in this action upon the ground and for the reason that the action is brought by certain persons as individuals who claim to represent an organization known as the Western Federation of Miners, and the Western Federation of Miners no place appears as a plaintiff in this action, and that the others, Charles H. Moyer, Ernest Mills and C. E. Mahoney would have no interest whatever in the outcome of this action as individuals.

Which objection was by the Court overruled, to which ruling the defendants then and there duly asked for and was allowed an exception.

A. Denver, Colorado.

Q. And what state are you a citizen of?

A. Colorado.

Q. Mr. Mahoney, for whom did you bring this action, [248] this particular action?

Mr. BREEN.—Just a moment. We object to the question at this time as being incompetent and irrelevant for the reason that the membership of this witness or his right to bring the action in a representative capacity has not yet been shown.

Mr. GEAGAN.—It will be shown. We cannot try all our case at once.

Which objection was by the Court overruled, to which ruling the defendant then and there duly asked for and was allowed an exception.



(Testimony of Charles E. Mahoney.)

A. On behalf of myself and all other members of the Western Federation of Miners.

The WITNESS.—I am a member of the Western Federation of Miners, and have been such member since 1888, and was such member during all of the year 1915 and still am. I am vice-president of the organization, and my office is at Denver, Colorado. The offices and headquarters of the Western Federation of Miners is at Denver, Colorado. The Western Federation of Miners is composed of men working in and around the mines, mills and smelters, organized into local unions.

Q. How many of these men are there in the Western Federation of Miners, this organization?

A. There are several thousands of them.

Mr. BREEN.—We object to that as being indefinite. [249]

Which objection was by the Court overruled, to which ruling the defendant then and there asked for and was allowed an exception.

The WITNESS.—There are approximately eleven thousand, and those men reside in the various mining camps throughout the various states of the United States and Canada, and with but very few exceptions they do not do any work but in and about mines, mining ore and such, and being engaged in smelting of minerals. I am acquainted with Mr. Charles H. Moyer and last saw him last Sunday at Denver, Colorado.

Q. Do you know of what state Mr. Moyer is a citizen?

(Testimony of Charles E. Mahoney.)

Mr. BREEN.—Just a moment. We object to that as not being the best evidence. It would be only hearsay.

Which objection was by the Court overruled, to which ruling the defendant then and there duly asked for and was allowed an exception.

A. Yes.

The WITNESS.—He is a citizen of the State of Colorado, and resides at Denver, Colorado. When I am speaking of Mr. Charles H. Moyer, I am speaking of Charles H. Moyer who is the plaintiff in this action. He is the president of the Western Federation of Miners, this organization, and his office is at Denver, Colorado. I am acquainted with Mr. Ernest Mills, and at the present time he is here in the courtroom. [250]

Mr. GEAGAN.—That is all for the present, Mr. Mahoney. It will be necessary to recall Mr. Mahoney later.

Mr. BREEN.—We might shorten this up by examining Mr. Mahoney when you call him later.

(Witness excused.) [251]

### **Testimony of Ernest Mills, for Plaintiff.**

ERNEST MILLS, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. HILTON.

The WITNESS.—My name is Ernest Mills, and I reside at Denver, Colorado. I am a citizen of that State. I am acquainted with the organization known as the Western Federation of Miners, and I

(Testimony of Ernest Mills.)

am secretary-treasurer of that organization. It is a labor organization, composed of men working in and around mines, mills, smelters and reduction of ores, and it is not incorporated, but is a volunteer association.

Q. And how large is the organization; what is the number of its membership, approximately?

Mr. BREEN.—Just a moment; we object to this as not being the best evidence, this being the officer who has control of the records, evidently, and he ought to have them with him if he has not.

The COURT.—I think if he has knowledge from the records he may answer, then if you wish to verify that by consulting the records, the privilege will be granted you. Overruled.

To which ruling the defendant then and there duly asked for and was allowed an exception.

A. Several thousand.

The WITNESS.—And residents of different states, and [252] of the British empire. I have been acting as secretary of that organization since the latter part of December, 1907, and was acting as such during the year 1914. During that year, in the latter part of that year, I was acquainted with an organization known as the Butte Miners' Union, which was located at Butte, Montana, and was an incorporated body. During the month of September, 1914, I had business negotiations with the officers of that organization as secretary of the Western Federation of Miners. The document which you now call to my attention I have seen before. It was sent

(Testimony of Ernest Mills.)

I think either to me or to President Moyer. I saw it at the general offices of the Western Federation of Miners, and it was sent by Frank O'Connor, president of the Butte Miners' Union, a corporation, Pat O'Neil, secretary, M. A. Sullivan, James Welch and James J. Ryan, board of directors or trustees.

(Document marked Plaintiffs' Exhibit "A" for identification.)

Mr. HILTON.—We offer this, if the Court please, in evidence. It purports to be an application made by the officers of the local union No. 1, Butte Miners' Union, for the reissuance of a charter, in which they state substantially that at a regular meeting of their organization by due action taken, such a request was resolved upon, and that they now make an application to the parent organization for a charter to take the place of the original charter, it having been lost or destroyed. The application further sets [253] up the fact that it is agreed by them that in the event such request is acceded to that the corporation on their part will conform to all and every of the provisions of such charter if issued, and abide by all the rules and regulations of the Western Federation of Miners; signed with the signature of the officials and attested by the seal. And that by reason of that request, after due and particular action taken, said charter was issued by the secretary-treasurer.

Mr. BREEN.—If your Honor please, we object to this offer on the ground and for the reason that the same shows upon its face that it has been tampered with since its original drawing and it is not the same document that was offered in the District Court of



(Testimony of Ernest Mills.)

the Second Judicial District of the State of Montana, in an action to get control of the same property that is in issue. This amendment that appears here by interlineation and with a different ink, was not in the original document.

The COURT.—For the present the objection will be overruled, and an exception noted.

Document marked Plaintiff's Exhibit "A," and is as follows:

**Plaintiffs' Exhibit "A"—Application for  
Reissuance of Charter.**

To the President of the Western Federation of Miners, Denham Building, Denver, Colorado.

The Butte Miners' Union, a corporation, organized [254] and existing under and by authority of the laws of the State of Montana, at a regular meeting held at the headquarters of the said corporation, 217 North Main St., Butte, Montana, on the 22 day of Sept., 1914, 1914, by a majority vote of its membership present at said meeting passed a resolution directing and instructing its President, Secretary and Board of Directors or Trustees to apply to the Western Federation of Miners for a reissuance of a charter recently lost or destroyed, and said resolution empowered and authorized its aforesaid officers to take all necessary steps and do all necessary things in order to procure said charter.

Now, therefore, we, Frank O'Connor, President, Pat O'Neill, Secretary, and Mike A. Sullivan, James Walsh, James Ryan, Frank Martin, Pat Quigley,

constituting the Board of Directors or Trustees of the said corporation, pursuant to the said resolution and by authority thereof, hereby make application to you for the reissuance of a charter for a local union to be issued to the said corporation, which shall be known as the Butte Miners' Union No. 1, Western Federation of Miners, which shall take the place of its first charter recently lost or destroyed.

It is hereby agreed in the acceptance of the said charter that the aforesaid corporation shall conform to all of its provisions and that the same are fully understood, and to the constitution, by-laws, rules and regulations of the Western Federation of Miners. [255]

IN TESTIMONY WHEREOF, the said corporation has caused this application to be signed by its President, Secretary and Board of Directors or Trustees, and its corporate seal to be attached thereto this 22d day of Sep., 1914.

[Seal]

THE BUTTE MINERS' UNION, a Corporation,

FRANK O. CONNOR,

President.

PAT O. NEILL,

Secretary.

M. A. SULLIVAN,

JAMES WALSH,

JAS. J. RYAN,

Board of Directors or Trustees.

The WITNESS.—Upon the receipt of that application by me as secretary-treasurer of the Western

Federation of Miners, the charter was granted. The application was filed. The document to which you called my attention is a true copy of the charter so granted. After it had been issued it was sent to the secretary of the Butte Miners' Union.

(Document received in evidence, marked Plaintiffs' Exhibit "B," and is as follows:

**Plaintiff's Exhibit "B"—Charter Issued by  
Western Federation of Miners to Butte Miners'  
Union.**

**WESTERN FEDERATION OF MINERS  
Education Independence Organization  
CHARTER.**

KNOW ALL MEN BY THESE PRESENTS, that acting under the authority vested in us by the laws of the above-named organization, [256] we, the undersigned, do hereby grant this Charter to Butte Miners' Union, a Corporation, to be hereafter known and designated as The Butte Miners' Union, No. 1, Western Federation of Miners, TO BE HELD BY THEM AND THEIR SUCCESSORS. And the aforesaid Union being properly installed, is hereby authorized and empowered to transact business and initiate into its membership any person or persons lawfully proposed and elected in accordance with the Constitution, Rules and Regulations of the Western Federation of Miners. It is hereby agreed in the acceptance of this Charter that the aforesaid Union shall conform to the Constitution, Rules and Regulations and in default thereof this Charter may be

(Testimony of Ernest Mills.)

revoked and the union suspended from all rights and benefits according to the laws of the Western Federation of Miners, and, further, it is agreed, that should the aforesaid union withdraw or be dissolved, suspended, or forfeit this Charter, then all property, moneys, books and papers shall become the property of the Western Federation of Miners.

In consideration of the due and faithful performance of the foregoing stipulations the Western Federation of Miners do bind themselves to sustain said union in the exercise of all rights, privileges and benefits as a local union under its protection.

IN WITNESS WHEREOF we have subscribed our names and affixed our Seal of the Western Federation of Miners this [257] Third day of October, 1914. The Butte Miners' Union, organized June 13, 1878. Original W. F. M. Charter, dated May 15, 1893.

[Seal]

CHAS. H. MOYER,

President.

Ernest Mills,

Secretary-Treasurer.

Wealth belongs to the producer thereof.

The WITNESS.—That was forwarded to the Butte Miners' Union at the time it was dated. I am acquainted with the signature of Mr. Lee, and this is Pat Lee's signature. At that time he occupied the office of Secretary-Treasurer of the Butte Miners' Union. I received this letter in due course of mail from Mr. Lee.



Document received in evidence, marked Plaintiffs' Exhibit "C," and is as follows:

**Plaintiffs' Exhibit "C"—Letter, November 24, 1914,  
Lee to Mills.**

Hall of

**BUTTE MINERS' UNION.**

Organized June 13, 1878.

Butte, Mont., Nov. 24th, 1914.

Ernest Mills,

Denver, Colo.

Dear Sir & Bro.

In reply to you concerning the charter we have received it but there is a little dispute about putting it up as some of the members wants a copy of the old charter from Helena Mont.—we have written their but has not heard from the Sec. of State. I suppose he is busy going over the [258] election returns.

Hoping you will excuse me for not answering your litter sooner but have been sick for two weeks.

Fraternally yours,

[Seal]

PAT LEE,

Sec Tres.

Mr. HILTON.—We offer in evidence, if your Honor please, the allegation of the complaint admitted by the answer, "that afterwards, by resolution, the Butte Miners' Union, withdrew from the Western Federation of Miners, on or about the 15th day of June. That the contract evidenced by said application and charter was made in the State of Montana. That on or about said 15th day of June, A. D. 1915, the said corporation, the Butte Miners'

(Testimony of Ernest Mills.)

Union, passed a resolution withdrawing from the Western Federation of Miners and refusing to longer affiliate with the said Western Federation of Miners." That admission was made. About the 13th day of July, 1915, demand was made upon the said defendant corporation by and on behalf of the plaintiffs, the members of the Western Federation of Miners, that it turn over to and transfer to the Western Federation of Miners, all of the property, money, books, and papers that it owned on the date of the passage of the aforesaid resolution withdrawing from the Western Federation of Miners, refusing longer to affiliate with the Western Federation of Miners; that the said corporation has not turned over to, [259] transferred to, or conveyed to, the Western Federation of Miners, or in any manner or at all put the property which it owned at the time of the passage of the said resolution last mentioned in the hands of, or possession of the said Western Federation of Miners; and that the said corporation defendant still claims to be the owner of all of the property that it was the owner of at the time of the passage of the last-mentioned resolution, and denies that the Western Federation of Miners is the owner of or entitled to the said property, and denies the right of the plaintiffs, the members of the Western Federation of Miners, to the ownership of said property, and refuses to allow them to take or hold said property, and refuses to convey, transfer or deliver said property to the plaintiffs, your ora-

(Testimony of Ernest Mills.)

tors." Those allegations are fully admitted by the answer.

Q. Mr. Mills, pursuant to the terms of that charter which you say was issued to and sent to the Butte Miners' Union No. 1, what has the Western Federation of Miners done since that time, pursuant to the terms of that contract?

A. They have complied with every request, I believe, of the local union in the way of any consideration or assistance.

The WITNESS.—That has consisted of this: They have always taken part in the deliberations of the Western Federation [260] of Miners, and in its conventions and members of the Butte Miners' Union have enjoyed the protection whenever they went out with the organization; been taken in fraternally if they went to the United Mine Workers; they enjoyed the same privileges. The Western Federation of Miners defended suits in South Dakota that were brought against the Butte Miners' Union and the Western Federation of Miners was joined plaintiffs.

Cross-examination by Mr. BREEN.

Q. You say that they complied with every request of this charter, and that they, that we, the Western Federation of Miners, assisted them, and so forth. Is it not a fact that they did nothing of the kind, and that the Western Federation of Miners was practically extinct; is that not a fact?

A. No, sir.

Q. Is it not a fact that the Western Federation of

(Testimony of Ernest Mills.)

Miners was without funds to enable, to send the delegate, Jim Shea, that was elected at the last convention in Denver, to Philadelphia, as a delegate to the American Federation of Labor, and appealed to the Butte Miners' Union to pay the expenses of this delegate, and saying they were broke and unable to do so, and didn't the Butte Miners' Union pay the expenses of Jim Shea from Butte to Philadelphia and return, [261] and never received a cent back?

Mr. HILTON.—If your Honor please, it seems to me that this is objectionable, for it is not competent at this time to go into all of the dealings or of the specific matter that may be embraced in the dealings between these two organizations.

The COURT.—The objection will be overruled. Now, you may answer the question.

A. May I answer it in the way of an explanation?

The COURT.—State whether what he asked you is true or not, and then if there is any explanation—

A. Not in the way Mr. Breen puts it. If I will be allowed to state, it is very customary for a number of local unions where some delegate has not had sufficient funds been levied to attend the convention, for the local union to expend it, and for the Federation to reimburse the local union. It has been done numerous times with the Butte Miners' Union and the Anaconda Union and various others. It is nothing more than an ordinary transaction of business. The Federation was not broke, as I think we could



(Testimony of Ernest Mills.)

bring substantial evidence in the way of finances, to show that without any difficulty.

Q. Did you not write to this defendant Union and state that you were broke, and ask them to send Jim Shea to Philadelphia and pay his expenses?

The COURT.—If you have any such letter the witness is [262] entitled to see it.

Mr. BREEN.—We have if we could find it, but I doubt if those matters, due to the fact that all the files and stuff that were kept—

The COURT.—You may answer if you have a recollection.

A. I have no recollection. Mr. Moyer may have written it, but I don't think I may have done. I would know if I saw the letter.

Q. Don't you know Mr. Meyer sent a telegram in substance to Mr. Shea as I have stated?

Mr. HILTON.—I submit that question would be improper.

The COURT.—Yes. If you have such a telegram, produce it.

Mr. BREEN.—As I stated before, if we can find it we will produce it.

The COURT.—What has become of your files?

Mr. BREEN.—Muckie McDonald's bunch took care of them from the 13th to the 23d, and we have not been able to see them since.

The COURT.—If the witness knows, he may answer. Overruled.

To which ruling of the Court the plaintiffs then

(Testimony of Ernest Mills.)

and there duly asked for and were allowed an exception.

A. This occurrence was after the wrecking of the Butte Miners' Union, and if you have got the letter why, I would know the letter. I believe it is possible that Mr. [263] Moyer might have wired to the secretary of the Butte Miners' Union to advance the delegate funds to proceed to Philadelphia on; it is possible that that might have occurred; I couldn't state from knowledge, but I know it is not unlikely to occur, such a proceeding.

Q. Do you know of your own knowledge whether or not Mr. Moyer requested the local union, defendant here, to pay for him, on behalf of the Federation, the sum of One Hundred Thirty Dollars that he had contracted for guns just prior to the twenty-third day of June, last, and which he was unable to pay for? A. I have absolutely no knowledge.

Mr. GEAGAN.—Just a moment. We submit that such a question is entirely improper and objectionable, and is not within the issues.

The COURT.—The witness has answered that he has no knowledge.

The WITNESS.—I have stated that the Western Federation of Miners was a volunteer association and by that I mean that it is not incorporated in any State or territory. It is an organization in which the members join subject to the approval of the local. They can, under such circumstances, be issued a withdrawal card.











